(19,043.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 102.

THE NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM S. ELY, MARVIN ARNOLD, JULIA ARNOLD ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

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No. 3681.

Filed Jul- 25 1900.

C. S. REINHART, *Clerk.*

1 In the Superior Court of the State of Washington for Spokane County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,

vs.

WILLIAM S. ELY, GEO. H. MILLER (alias C. P. HALLETT), OLAF Hammerlund, Karl J. Berggren, W. F. Metchem, Ida Metchem, James Albi, William Albi, P. Welch, Marvin Arnold, Julia Arnold, Henry A. Willey, Sarah A. Willey, Frank Johnson, Hannah Johnson, C. H. Bungay, Alice F. Bungay, H. C. Davis, Louise Davis, James McKenzie, Jennie McKenzie, Jerry Barry, Johanna Barry, J. H. Fox, L. B. Whitten, Georgia B. Whitten, John Hand, Ellen Hand, Dennis Monagle, Anton Hahn, Hubert Zimprick, Max Rauscher, Christina Rauscher, Michael Blessing, Mary Blessing, Leopold Zimprick, Anna Zimprick, Hans Carstens, John Erickson, Elmer E. Alexander, Bertie E. Alexander, Christian Haas, Mary Haas, Z. Colby, Sophia Colby, Joseph B. Goodner, Sallie Goodner, Jacob Esch, Catherine Esch, Gilbert M. Johnson, Eda Johnson, G. A. Davis, Hannah C. Davis, Robert McKenzie, Anne McKinzie, Jacob Steiner, L. Farrington, Lizzie Farrington, A. J. Ottomeier, Annie Ottomeier, John Edwards, America Edwards, James Perry, Maria C. Perry, Silas J. Tift, Sarah Tift, Covert August, Pauline E. August, Richard H. Hall, Martha Hall, George Lucas, D. Bell, Stephen D. Stroup, Mary E. Stroup, L. Roy Slater, Julius Koehler, Margaret Koehler, R. J. Fisk, Temperance Fisk, G. Seeberger, —— Seeberger, John J. Browne, Anna W. Browne, Claribel Kaufman, Isaac S. Kaufman, The Jennings Trust Company, Daniel Stewart, Marcus A. Bettman, Northwestern & Pacific Hypotheekbank (Northwestern & Pacific Mortgage Company), Gustave Reith, Solicitors Loan & Trust Company, and Thomas De Witt Cuyler and Effingham C. Morris, Assignees; Eugene Germond, Claudie A. Germond, Jacob Loertcher, Edward Stewart, W. M. Ridpath, as Special Administrator of the Estate of Anthony M. Cannon, Deceased; W. M. Ridpath, as Special Administrator of the Estate of Jennie F. Cannon, Deceased; Marie Bennett, Katherine Allen, Ralph L. Clarke, Josephine Clarke, Mary Templeton, Selma Eversole, Elanor D. Cannon, A. L. Davis, S. D. Jones, Marie Nelson, Anna McKeon Smith, J. Anthony Smith, Spokane & Eastern Trust Company, R. C. McCaffery, John McNamara, David Holzman, Mrs. M. Leonard, L. L. Greentre, Victor Schlater, Eugene Schlater, Theodore S. Covernton, G. O. Buchanan, William Brandt, D. F. Mulcahey, A. Bush (Doing Business under the Name and Style of Ladd & Bush), F. J. J. Quirk, Vermont Loan & Trust Company, Edward T. Cushing, H. Ray Boudinot, and Ned C. McKinstry, Defendants.

Amended Complaint.

Plaintiff for amended complaint alleges:

I.

That plaintiff, above named, is a corporation, organized and incorporated under and by virtue of the laws of the State of Wisconsin.

II.

That defendants Olaf Hammerlund and Karl J. Berggren are copartners doing business under the firm name and style of Hammerlund & Berggren; defendants James Albi and William
2 Albi are copartners doing business under the firm name and style of James Albi & Brother; defendants W. F. Metchem and Ida Metchem are husband and wife; defendants Marvin Arnold and Julia Arnold are husband and wife; defendants Henry A. Willey and Sarah A. Willey are husband and wife; defendants Frank Johnson and Hannah Johnson are husband and wife; defendants C. H. Bungay and Alice F. Bungay are husband and wife; defendants H. C. Davis and Louise Davis are husband and wife; defendants James McKenzie and Jennie McKenzie (née Jennie Zeeck) are husband and wife; defendants Jerry Barry and Johanna Barry are husband and wife; defendants L. B. Whitten and Georgia B. Whitten are husband and wife; defendants John Hand and Ellen Hand are husband and wife; defendants Max Rauscher and Christina Rauscher are husband and wife; defendants Michael Blessing and Mary Blessing are husband and wife; defendants Leopold Zimprick — Anna Zimprick are husband and wife; defendants Elmer E. Alexander and Bertie E. Alexander are husband and wife; defendants Christian Haas and Mary Haas are husband and wife; defendants Z. Colby and Sophia Colby are husband and wife; defendants Joseph B. Goodner and Sallie Goodner are husband and wife; defendants Jacob Esch and Catherine Esch are husband and wife; defendants Albert M. Johnson and Eda Johnson are husband and wife; defendants G. A. Davis and Hannah C. Davis are husband and wife; defendants Robert McKenzie and Anne McKenzie are husband and wife; defendants L. Farrington and Lizzie Farrington are husband and wife; defendants A. J. Ottomeier and Annie Ottomeier are husband and wife; defendants John Edwards and America Edwards are husband and wife; defendants James Perry and Maria C. Perry are husband and wife; defendants Silas J. Tift and Sarah Tift are husband and wife; defendants Covert August and Pauline E. August are husband and wife; defendants Richard H. Hall and Martha Hall are husband and wife; defendants Stephen D. Stroup and Mary E. Stroup are husband and wife; defendants Julius Koehler and Margaret Koehler are husband and wife; defendants

R. J. Fisk and Temperance Fisk are husband and wife; defendants G. Seeberger and —— Seeberger are husband and wife; defendants John J. Browne and Anna W. Browne are husband and wife; defendants Isaac Kaufman and Claribel Kaufman are
3 husband and wife; defendant The Jennings Trust Company is a corporation, organized and incorporated under the laws of the State of Illinois; defendant Northwestern & Pacific Hypotheekbank (Northwestern & Pacific Mortgage Company) is a corporation, organized and incorporated under and by virtue of the laws of the Kingdom of the Netherlands; defendant Solicitors' Loan & Trust Company is a corporation, organized and incorporated under and by virtue of the laws of the State of Pennsylvania; defendants Eugene Germond and Claudie A. Germond are husband and wife; defendant W. M. Ridpath is the duly appointed, qualified and acting special administrator of the estate of Anthony M. Cannon, deceased, and is the duly appointed, qualified and acting special administrator of the estate of Jennie F. Cannon, deceased; defendant Spokane & Eastern Trust Company is a corporation, organized and incorporated under and by virtue of the laws of the State of Washington; defendant Vermont Loan & Trust Company, is a corporation organized and incorporated under and by virtue of the laws of the State of North Dakota.

III.

That on the 3rd day of January, 1896, defendant The Solicitors' Loan & Trust Company, being then indebted unto divers persons in different sums of money, and being desirous of appropriating all and singular its personal property and estate in the State of Washington for the benefit of its creditors, granted, sold, bargained, assigned, transferred and set over unto defendants Thomas De Witt Cuyler and Effingham B. Morris, to hold in trust for the benefit of its creditors all and singular the personal property and personal estate of every kind and description belonging to it, the said The Solicitors' Loan & Trust Company, situate and being in said State of Washington; and that said defendants, Thomas De Witt Cuyler and Effingham B. Morris, accepted the provisions of said trust, and are the duly qualified and acting trustees and assignees of said company and trust.

IV.

That at all the times hereinafter mentioned the Northern Pacific Railroad Company was a corporation, organized, created and existing under and by virtue of an act of Congress, approved
4 July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound, on the Pacific coast, by the northern route," and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

V.

That, by the terms and provisions of said act, said corporation was authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route as should be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget's sound, with a branch line, via the Columbia river, to a point at or near Portland, in the State of Oregon.

VI.

That the second section of said act of Congress is in words and figures as follows:

"And be it further enacted, That the right of way through the public lands be, and the same is hereby, granted to said 'Northern Pacific Railroad Company,' its successors and assigns, for the construction of a railroad and telegraph as proposed, and the right, power and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turn tables, and water stations; and the right of way shall be exempt from taxation within the territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the road named in this bill."

VII.

That the fourth section of said act of Congress was and is in words and figures as follows, to wit:—

"And be it further enacted, That whenever said 'Northern Pacific Railroad Company' shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States, and patents of lands as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated

opposite to, and coterminous with, said completed section of said road; and from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty five miles of said road is completed as aforesaid; provided that not more than ten sections of land per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad shall be finished and in good running order, as a first-class railroad, from the place of beginning on Lake Superior to the western boundary of Minnesota; provided, also that lands shall not be granted under the provisions of this act on account of any railroad or part thereof, constructed at the date of the passage of this act."

VIII.

That the twelfth section of said act of Congress was and is in words and figures as follows:

"And be it further enacted, That the acceptance of the terms, conditions and impositions of this act by the said Northern Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall be served on the President of the United States."

IX.

That said railroad company accepted the terms, conditions and impositions of said act of Congress in writing under its corporate seal, pursuant to the direction of its board of directors, first had and obtained, and on the 29th day of December, A. D. 1864, served such acceptance on the President of the United States.

X.

That prior to the year 1888 said railroad company definitely fixed the line of its said railroad, extending from the waters of Lake Superior to a point on Puget sound, and prior to said year constructed and caused to be constructed and put in operation a continuous line of railroad and telegraph, extending from the waters of Lake Superior westerly across the State of Minnesota, and the Territories of Dakota, Montana, Idaho and Washington, to the waters of Puget sound. That as fast as portions of said railroad and telegraph line, equal to or exceeding twenty-five miles in length, were so constructed, as aforesaid, they were examined by commissioners ap-

6 pointed by the President of the United States, and by said commissioners were found to have been constructed in a good, substantial and workmanlike manner, in all respects as required by said act of Congress. That said reports were accepted and approved by the President of the United States, as provided in said act of Congress approved July 2, 1864.

XI.

That the portion of said railroad extending from the town of Spokane Falls, Washington, to Wallula, Washington, was definitely fixed prior to the 4th day of October, 1880; and on said last named date a plat of said portion, approved by the Secretary of the Interior was filed in the office of the Commissioner of the General Land Office.

XII.

That the portion of said railroad extending from the town of Spokane Falls, Washington, to Lake Pend d'Oreille, in the State of Idaho, was definitely fixed prior to the 30th day of August, 1881, and on said last named date a plat of said portion, approved by the Secretary of the Interior, was filed in the office of the Commissioner of the General Land Office.

XIII.

That said portions of said railroad as fixed in said plats of definite location crossed over and upon the following described lands, situate in the county of Spokane, Territory (now State) of Washington, to wit: Sections 24, 26, 32 and 34, in township 26 north, range 45 east, W. M. sections 5 and 6, in township 25 north, range 45 east, W. M. sections 4, 8 and 9 in township 25 north, range 44 east W. M.; sections 12 and 14, in township 25 north, range 43 east, W. M.; sections 12, 22 and 28, in township 24 north, range 42 east, W. M.; sections 4 and 6, in township 23 north, range 42 east, W. M.; sections 14, 22, 27, 28 and 29, in township 23 north, range 41 east, W. M.; the south half of the northeast quarter of section 24, in township 25 north, range 42 east, W. M. wrongfully platted as a part of Cannon's addition to the city of Spokane Falls (now Spokane); the north half of the northeast quarter of section 24 in township 25 north range 42 east, W. M., wrongfully platted as a part of Browne's addi-
7 tion to the city of Spokane Falls (now Spokane); the southeast quarter of the southeast quarter of section 18, in township 25 north, range 43 east, W. M., wrongfully platted as a part of Havermale's addition to the city of Spokane Falls (now Spokane); the northwest quarter of the northwest quarter of section 20, in township 25 north, range 43 east, W. M., wrongfully platted as a part of Saunders' addition to the city of Spokane Falls (now Spokane); and that portion of the northeast quarter of the southwest quarter of section 24, in township 25 north, range 42 east, wrongfully platted

as lots 11, 12 and 13 of block 2 of Cœur d'Alene addition to the city of Spokane Falls (now Spokane).

And the said Northern Pacific Railroad Company constructed said line of railroad and telegraph upon the line indicated and fixed by the said plats of definite location over and across the above mentioned and described property.

That the line of said railroad as so constructed and operated across the said lands was and is coterminous with the line of said railroad as fixed and designated in said plats of definite location.

XIV.

That the said Northern Pacific Railroad Company continuously operated its trains upon said portions of its right of way until the 31st day of August, 1896, at which date plaintiff succeeded to all the right, title and interest of said Northern Pacific Railroad Company as hereinafter alleged.

XV.

That the lands hereinbefore described were, on the 2nd day of July, 1864, and on the dates of the filing of said maps of definite location, public lands of the United States, subject to the grant of the United States Government for the use of said railroad company as aforesaid, and were free from homestead or pre-emption entries or other claims or rights.

XVI.

That on or about the 31st day of August, 1896, plaintiff by virtue of certain deeds of conveyance, duly signed, executed and delivered,
became the successor in interest of said Northern Pacific
8 Railroad Company, and became the owner of all the property, of whatsoever kind, including franchises and the said right of way, of said Northern Pacific Railroad Company.

That plaintiff became the owner of said property situate in the State of Washington, by virtue of foreclosure proceedings in the circuit court of the United States for the ninth judicial circuit, district of Washington, in that certain action wherein the Farmers' Loan & Trust Company was complainant and The Northern Pacific Railroad Company and others were defendants, in which action a mortgage was foreclosed and the said property sold, and the said sale confirmed by the court.

XVII.

That plaintiff now is, and ever since said 31st day of August, 1896, on which day it succeeded as aforesaid, to all of the right, title and interest of said Northern Pacific Railroad Company in and to said right of way, has been, the owner of and entitled to the sole and exclusive and immediate possession of said right of way, being two

hundred feet in width on each side of said railroad where the same is constructed through the premises described in paragraph thirteen herein.

XVIII.

That plaintiff now is, and ever since the 31st day of August 1896, has been continuously operating said railroad as a common carrier for the purpose of transporting passengers, freight and the United States mails.

XIX.

That the defendants are, and each of them is, unlawfully and wrongfully in possession of portions of said right of way hereinbefore described, and fail, neglect and refuse to surrender possession of said described right of way, or any part thereof.

XX.

That the defendants and each of them claim some right, title or interest or estate in or to the said described right of way, to wit, two hundred feet in width on each side of said railroad where
9 the same crosses the premises described in paragraph thirteen herein, adverse to the interest and title of plaintiff, which claim of defendants and each of them is without foundation and wrongful.

XXI.

That the claim of defendants and each of them is without any right whatsoever, and that said defendants and each of them have no estate, right, title or property whatsoever in or to said right of way or any part thereof; that the claims so asserted by defendants create a cloud upon the title of plaintiff in and to its said right of way.

Wherefore plaintiff prays:—

1st. That the defendants be required to set forth the nature of their claims to said premises, and that all adverse claims of the defendants be determined by a decree of this court.

2nd. That by said decree it be adjudged and decreed that the defendants have no right, title, interest or estate whatever in or to said lands and premises, or any part thereof; and that the title of plaintiff be decreed a good and valid title.

3rd. That defendants be enjoined and forever debarred from asserting any claim whatsoever in or to said land and premises, or any part thereof, adverse to plaintiff; that plaintiff have judgment and decree quieting title against the defendants and removing the cloud from plaintiff's title created by the pretended claim of defendants and their occupancy of said premises; and that plaintiff be adjudged and decreed entitled to the immediate and exclusive — of said premises, and the whole and every part thereof, and be put in possession thereof by order of this court.

4th. That plaintiff have such other and further relief as to this court shall seem meet and proper.

5th. That plaintiff have and recover of and from the defendants its costs and disbursements herein.

STEPHENS & BUNN,
Attorneys for Plaintiff.

10 STATE OF WASHINGTON, } ss:
County of Spokane, }

F. D. Gibbs, being first duly sworn on oath deposes and says: that he is an officer of the Northern Pacific Railway Company, a corporation, the plaintiff above named, to wit, its general agent at and in the city and county of Spokane, State of Washington, and makes this verification for and on behalf of said plaintiff; that he has read the above and foregoing amended complaint and knows the contents thereof, and the same is true as he verily believes.

F. D. GIBBS.

Subscribed and sworn to before me this 20th day of January, 1899.

[SEAL.] E. T. WHITE,
Notary Public in and for the State of Washington, Residing at Spokane, Washington.

Personal service of the above and foregoing amended complaint by a true copy thereof is hereby admitted at Spokane, Washington, this 20th day of January, 1899.

WM. D. SCOTT,
JOS. ROSSLOW, &
JOHN B. HESS,
Attorneys for Defendants Dennis Monagle, Anton Hahn, Max Rauscher, Leopold Zimprick, Anna Zimprick, Christian Haas, and Mary Haas.

WINSTON & WINSTON,
Attorneys for Defendant L. Roy Slater.

BLAKE & POST,
Attorneys for Defendants James McKenzie and Jennie McKenzie.

HYDE & DAWSON,
Attorneys for Defendants Marvin Arnold and Julia Arnold, Michael Blessing and Mary Blessing.

HENRY, KELAM & LINDSLEY,
Attorneys for Defendants Olaf Hammerlund, Karl J. Berggren, W. F. Metchem, Ida Metchem, James Albi, and William A. Albi.

Filed Jan. 20 1899 at 4 o'clock p. m.
JAMES A. DRAIN, *Clerk.*
R. A. KOONTZ, *Deputy.*
2—102

11 In the Superior Court of the State of Washington for Spokane County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
WILLIAM S. ELY ET AL., Defendants.

The defendant, William S. Ely, answering the amended complaint of the plaintiff herein,

I.

Admits the first allegation of said complaint.

II.

As to the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 14th, 15th, 16th, and 17th paragraphs of said complaint, this defendant has no knowledge or information sufficient to form a belief, and, therefore, denies the same.

II-.

This defendant denies each and every other allegation of said complaint, except as hereinafter qualified.

IV.

This defendant admits that the said Northern Pacific Railroad Company did cross upon the lands described in paragraphs 13 of said complaint, but denied that the plats therein referred to, and especially the plat of Havermale's addition was wrongfully platted; on the contrary, alleges that the said plat was in all respects regular and included as part thereof, lot one (1) of block three (3) of Havermale's addition to the city of Spokane Falls, now Spokane, Washington, according to the recorded plat thereof recorded in the office of the auditor of Spokane county, Washington.

V.

This defendant further admits that some of the defendants herein, and especially this defendant claims some right, title or interest or estate in or to the said pretended right-of-way referred to in paragraph 20 of said amended complaint, but denies that any of
12 said claims of the said defendants are without foundation or wrongful, and, on the contrary, alleges that the said claims are well founded and are rightful.

I.

For a further answer and affirmative defense to the said amended complaint this defendant alleges that the cause of action set up in

said amended complaint did not accrue within the last ten years, nor within the last seven years immediately preceding the beginning of this action and the same is, therefore, barred by the statute of limitations in such cases made and provided by the statutes of the State of Washington; that these defendants have been in the open, notorious and adverse possession of all of lot one (1) block three (3) of Havermale's addition to the city of Spokane Falls, now Spokane, according to the recorded plat thereof recorded in the office of the auditor of Spokane county, Washington, and that said lot was used and occupied for upwards of ten years open and notoriously, and the possession thereof had without let or hindrance on the part of the plaintiff above named or the Northern Pacific Railroad Company, or any person or corporation, for upwards of ten years and that a portion thereof was used and occupied by buildings from which rent had been received for upwards of ten years prior to the commencement of this action, and which were, together with the lands constituting said lot according to the said recorded plat, continuously occupied without let or hindrance or objection on the part of any person or corporation whatever, and all this to the knowledge of this plaintiff and its predecessors in interest and title.

II.

For a further answer and by way of a second affirmative defense this defendant alleges that neither the plaintiff nor its grantors nor predecessors were or have been seized or possessed of said lot one (1) block three (3) of Havermale's addition or of any part thereof for more than ten years prior to the commencement of this action.

III.

For further answer and by way of a third affirmative de-
13 fense herein this defendant alleges that more than ten years prior to the commencement of this action J. H. Landis became the owner by purchase from S. G. Havermale and wife of the said lot one (1) block three (3) of Havermale's addition. That the said S. G. Havermale and wife some years prior thereto platted a large tract of land situated north of what is known as Sprague avenue extending north to the Spokane river and including the lot above described. That in no manner or form was the right of said Havermale to plat said addition ever questioned prior to the time when they deeded to the said Landis, nor for upwards of ten years thereafter, and relying upon said plat and the fact that said property had belonged to and still belonged to said Havermale, the said Landis became the purchaser thereof in good faith and for a valuable consideration and without any knowledge of any rights of this plaintiff or its predecessors in title or interest, and the said Landis thereafter, and on October 25th, 1886, sold said property to one P. L. Kearney in good faith and without knowledge of any claim, or pretended claim, on the part of the plaintiff or its predecessors in title or in-

terest, and the said Kearney conveyed said property on November 19th, 1888, to one W. J. Dwyer under the same circumstances as to lack of knowledge of any equities or rights of any other persons or corporations, and on June 7th, 1889, the said Dwyer duly conveyed said property to Alice Houghton and H. H. Williams, who also took said property without notice or knowledge of any rights or equities of any persons or corporations, and because they understood from the public records of Spokane county that the title was duly vested in said Havermales free from any rights or equities of any persons or corporations, and that said property by successive conveyances passed to their grantor and that subsequently the said Williams and wife transferred all their interest in said property to said Alice Houghton.

That the said Alice Houghton executed a mortgage to this defendant Ely for the sum of $7,500, which said sum the said William S. Ely duly advanced to the said Alice Houghton and H. E. Houghton, her husband, in good faith and because he believed that no persons other than the said Houghtons had any title to or in-
14 terest in said property adverse to the said Houghtons, and that no corporation had any right to claim any part of the said property, and particularly the said plaintiff herein or its predecessors in interest or title. That upon the failure of the said Houghtons to pay any part of the principal sum due upon said mortgage, this defendant brought an action to foreclose the same and obtained judgment of foreclosure and sale, and said property was duly sold on June 5th, 1894, to satisfy a judgment of eight thousand six hundred eighty-seven dollars, fifty cents, ($8687.50) with interest at eight per cent. per annum from April 28th, 1894, and seven hundred and fifty dollars ($750.00) attorneys' fee and costs of suit, and plaintiff being the highest bidder purchased the said property and has ever since been the owner thereof. And the said action being 7316 of the file numbers of the causes on file in the clerk's office of Spokane county, reference to which is had for greater certainty. That for many years thereafter this defendant to the knowledge of the above named plaintiff and its predecessors in interest and title collected rents from the buildings standing upon said premises, and all this without let or hinderance from the plaintiff or its predecessors in title or interest.

IV.

For a further answer and by way of a fourth affirmative defense and counterclaim, this defendant alleges that ever since March 25th, 1892, the date when this defendant made the said loan of $7,500.00 to the said Houghton, this defendant has paid all the taxes due upon said property, together with various assessments for sewer and paving, for improvements made upon the streets surrounding said property amounting to several thousands of dollars, and that no taxes, assessments or improvements of any kind were paid for by the above named plaintiff or its predecessors in title or interest. That said

sums amount to at least the sum of four thousand ($4000) dollars for which said sum this defendant asks an affirmative judgment against the plaintiff in the event of an adverse judgment herein.

Wherefore, this defendant having fully answered, demands

1st. That plaintiff's complaint be dismissed with costs.

2nd. That this defendant be adjudged to be the owner in fee simple of lot one (1) block three (3) of Havermale's addition to Spokane Falls, now Spokane, Washington, according to the recorded plat thereof of record in the office of the auditor of Spokane county, Washington, free and clear of and from all claims, incumbrances or clouds upon the said title, and that if said defendant's title thereto be quieted and he be adjudged to have the right of possession of the said property, and the rents and profits thereof as against the plaintiff herein,

3rd. That said defendant have such further other or different relief as to the court may seem proper in the premises.

SAMUEL R. STERN,
Defendant's Attorney.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Samuel R. Stern being first duly sworn on oath states, that he is attorney for def't Ely in the above-entitled cause; that he has heard read the foregoing answer, knows the contents thereof and believes the same to be true. That he makes this verification because the defendant is a non-resident of the State & not now within the county of Spokane.

SAM'L R. STERN.

Subscribed and sworn to before me this 24th day of Oct. 1899.

CHAS. P. LUND,
Notary Public in and for the State of Washington,
Residing at the City of Spokane, Wash.

Filed Oct. 25 1899 at 9:50 o'clock a. m.
JAMES A. DRAIN, *Clerk.*
R. A. KOONTZ, *Deputy.*

In the Superior Court of the State of Washington in and for the County of Spokane.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
EUGENE GERMOND, CLAUDIE A. GERMOND, Jacob Loertcher, *et als.*, Defendants.

No. 13258. Answer of Defendants Germond and Loertcher.

The defendants Eugene Germond, Claudie A. Germond and Jacob Loertcher, answer the amended complaint of the plaintiff as follows :

I.

1. They admit that the northwest quarter of the northwest quarter (N. W. ¼ of N. W. ¼) of section twenty (20) in township twenty-five (25) north range forty-three (43) E. W. M. was platted as a part of Saunders' addition to the city of Spokane Falls (now Spokane) but deny that the same was so wrongfully platted.

2. They deny knowledge or information sufficient to form a belief as to any or either of the several matters and things alleged in paragraph XIV of said amended complaint.

3. They deny knowledge or information sufficient to form a belief as to any or either of the matters and things alleged in paragraph XV of said amended complaint.

4. They deny each and every matter and thing alleged in paragraph XVI of said amended complaint.

5. They deny each and every matter and thing alleged in paragraph XVII of said amended complaint.

6. They admit that they are in possession of certain portions of the said northwest quarter of the northwest quarter (N. W. ¼ of N. W. ¼) of section twenty (20) township twenty-five (25) north range forty-three (43) E. W. M. being lots No. ten (10), eleven (11) and twelve (12) in block No. one (1) of said Saunders' addition, as platted as aforesaid, but they deny that such possession is unlawful
17 or wrongful.

7. They admit that they clain some right title, interest or estate in and to the last above described real estate, but deny that such claim is without foundation or wrongful.

8. They deny each and every matter and thing alleged in paragraph XXI of said amended complaint.

II.

For a further and affirmative defense these defendants allege:—

1. That they are and have been since March 6, 1889, in the open notorious, adverse and exclusive possession, as the absolute owners by warranty deed, and under claim and color of title, of lots No. ten (10) eleven (11) and twelve (12) in block No. one (1) of Saunders' addition to the city of Spokane Falls (now Spokane), which is a part and portion of the said northwest quarter of the northwest quarter (N. W. ¼ of N. W. ¼) of section twenty (20), township twenty-five (25) north of range forty-three (43) E. W. M.; that prior to said 6th day of March, 1889, and ever since the 3rd day of August, 1883, the said premises have been continuously in the open, notorious, adverse and exclusive possession of the several parties and grantors through and from whom these defendants claim title as aforesaid, each and every of whom was in such possession under color and claim of title and absolute ownership and adversely to said plaintiff and of all persons under whom it claims.

2. That plaintiff's cause of action, as alleged in its amended complaint herein, did not accrue within ten years immediately preceding the commencement of this action.

III.

For a further and second affirmative defense defendants allege:

1. That they are and have been since March 6 1889, continuously in the actual open and notorious possession of lots No. ten (10) eleven (11) and twelve (12) in block No. one (1) of Saunders' addition to the city of Spokane Falls (now Spokane) which lots are a part and portion of the said northwest quarter of the northwest quarter (N. W. ¼ of N. W. ¼) of section twenty (20) township twenty-five (25) north of range forty-three (43) E. W. M., having a connected title in law deducible of record from the United States, to-wit, a patent from the said United States to H. T. Cowley, dated January 14, 1887, for certain lands of which said lots ten (10) eleven (11) and twelve (12) are a part and portion, and by subsequent successive conveyances by warranty deeds by and through several intermediate parties down to the said warranty deed of March 6, 1889, conveying said premises to these defendants, during all of which time to-wit, more than seven successive years, from March 6, 1889, these defendants have continued in possession of said premises and have during said time paid all taxes legally assessed on the same.

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2. That plaintiff's cause of action, as alleged in its amended complaint herein, did not accrue within seven years immediately preceding the commencement of this action, nor was this action brought within seven years next after these defendants took possession of said premises, as aforesaid.

IV.

For a further answer and counterclaim to said amended complaint these defendants allege:

1. That in the month of May, 1877, and when and while the said northwest quarter of the northwest quarter (N. W. ¼ of N. W. ¼) of section twenty (20,) township twenty-five (25) north range forty-three E. W. M., was public land of the United States and subject to entry under the homestead laws of the United States, one Henry T. Cowley, then a citizen of the United States and qualified and entitled to make entry of said lands as a homestead under said United States laws, did so enter the same in due form and take possession of, and with his family live upon and occupy and improve the same, and did subsequently make final proof of the same in the proper land office and did on the 10th day of April, 1883, receive from the receiver of said land office a final receipt therefor, and did subsequently receive from the United States Government a patent therefor in the usual form, conveying said premises and the full and com. title thereto to the said Henry T. Cowley.

19 2. That while the said Cowley was the owner as aforesaid of the lands so homesteaded including the said northwest quarter of the northwest quarter (N. W. ¼ of N. W. ¼) of section twenty (20), township twenty-five (25) north of range forty-three (43) E. W. M., he, together with his wife, conveyed said last described premises to Frank R. Moore, who, with his wife, afterwards, to wit, in July 1883, caused the said land to be surveyed, platted and laid out into lots, blocks, streets and alleys, and caused a map or plat of said survey showing said lots, blocks, streets and alleys to be made, signed, acknowledged and filed for record and recorded according to the laws of the then Territory of Washington, showing said land to be so platted and laid out as Saunders' addition to the city of Spokane Falls, (now Spokane) of which said plat and survey and addition lots No. ten (10), eleven (11) and twelve (12) in block No. one (1) are a part.

3. That from the time of the said platting, survey and dedication of said premises down to the 6th day of March, 1889, the said lots No. ten (10), eleven (11) and twelve (12) were continuously in the open peaceable and notorious possession of the said Moore and persons receiving title thereto from him and his grantees and were so held and possessed by such persons severally under color of title and adversely to said plaintiff and its grantors and all persons under whom it claims.

4. That on said 6th day of March, 1889, these defendants Germond and Loertcher, purchased and became the owners and took possession of said premises by virtue of a warranty deed from E. B. Gifford who was then the owner in fee simple and in possession thereof.

5. That these defendants are still in possession of said premises as owners as aforesaid and have, as such owners in possession and long prior to the commencement of this action, made valuable and permanent improvements thereon, amounting to not less than two thousand dollars.

6. That during all this time the said plaintiff has had full knowledge that these defendants were claiming to be and considered themselves as the absolute owners of said premises and have, without objection, notice or protest, allowed these defendants and their grantors, as such owners, to expend large sums of money in permanently improving said lots, grading the contiguous streets, building sidewalks, paying taxes thereon and otherwise exercising all the rights and performing all the duties incident to absolute ownership of these lots including the portions thereof which lie within the grounds now claimed by plaintiff.

7. That since the purchase of said lots by these defendants as aforesaid, and during their possession of the same as hereinbefore set forth, Sprague avenue, one of the streets of said city and against which lots abut has, by the authorities of said city, with the full knowledge and consent of plaintiff and its grantors, been improved graded and curbed, the cost of which was, with the knowledge and

consent of plaintiff, assessed against the abutting property including said lots, a part of which plaintiff now claims in this action, and these defendants have been compelled to pay and have paid a large sum of money therefor, to wit, eight hundred dollars, and have in addition thereto, paid the annual taxes assessed against said lots including that portion which the plaintiff now claims in this action, amounting in the aggregate to thirteen hundred and fifty dollars.

HENLEY, KELLAM & LINDSLEY,
Attorneys for Defendants Germond and Loertcher.

STATE OF WASHINGTON, } *ss:*
County of Spokane, }

Jacob Loertcher being first duly sworn on his oath deposes and says that he is one of the answering defendants in the above entitled action; that he has read the foregoing answer, knows the contents thereof and believes the same to be true.

J. LOERTCHER.

Subscribed and sworn to before me this 20th day of May, 1899.

JOSEPH B. LINDSLEY,
Notary Public for Washington, Residing at Spokane.

21 Service of the within answer is hereby admitted at Spokane, Washington, this 20th day of May, 1899.

STEPHENS & BUNN,
Attorney- for Pl'ff.

Filed Oct. 28, 1899, at 10:05 a. m.
JAMES A. DRAIN, *Clerk.*
R. A. KOONTZ, *Deputy.*

22 STATE OF WASHINGTON, } *ss:*
County of Spokane, }

In the Superior Court.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
WILLIAM S. ELY, GEORGE MILLER ET AL., James McKenzie, Jennie McKenzie *et al.*, Defendants.

No. —. Answer of James McKenzie.

James McKenzie, defendant in the above entitled action, for his separate answer herein:—

1. Denies that the real estate mentioned in paragraph 13 of the amended complaint, to wit, the northwest quarter of the northwest

quarter of section twenty (20), in township twenty-five (25) north range forty-three (43) E. W. M. was wrongfully platted as a part of Saunders' addition to the city of Spokane Falls, as alleged in said paragraph, but admits that the same was platted as a part of said addition.

2. Denies each and every allegation, matter and thing contained in paragraphs 14, 15, 16, 17 and 21 of said amended complaint.

3. Said defendant admits he and his wife, the defendant Jennie McKenzie are in possession of certain portions of the northwest quarter of the northwest quarter of said section twenty, which lie within two hundred feet of the main track of the Northern Pacific Railroad Company, where the same passes adjacent to said tract of land through the city of Spokane, but denies that such possession is unlawful or wrongful.

4. Denies each and every allegation, matter and thing contained in paragraph 20 of said amended complaint, except the allegation that the defendants McKenzie claim some right, title, interest or estate in and to certain portions of said real estate, which this defendant admits.

Affirmative Answer.

Said defendant for an affirmative answer to said amended complaint, alleges that the cause of action set up therein did not accrue within the last ten years immediately preceding the beginning of this action, and the same is therefore barred by the statute of limitations.

23 Wherefore, defendant, James McKenzie, prays that he be dismissed with his costs and disbursements.

BLAKE & POST,
Attorneys for Defendant James McKenzie.

STATE OF WASHINGTON }
County of Spokane, } *ss:*

James McKenzie, being duly sworn says he is the defendant named in the above entitled action; that he has heard read the foregoing answer, knows the contents thereof, and believes the same to be true.

JAMES McKENZIE.

Subscribed and sworn to before me this 31st day of January, 1899.

THOMAS B. HIGGINS,
Notary Public, Residing at Spokane, Washington.

Due and personal service of the within answer is hereby admitted at Spokane, Washington, this 14th day of Feb'y 1899.

STEPHENS & BUNN,
Attorney- for Pl'ff.

Filed October 30 1899 at 10:35 o'clock a. m.
JAMES. A. DRAIN, *Clerk.*
R. A. KOONTZ, *Deputy.*

24 In the Superior Court of the State of Washington for Spokane County.

NORTHERN PACIFIC RAILWAY CO., Plaintiff,
vs.
WILLIAM S. ELY, MARVIN ARNOLD, JULIA ARNOLD, MICHAEL Blessing, Mary Blessing, and Gustave Reith *et al.*, Defendants.

Come now the above named defendants Marvin Arnold, Julia Arnold, Michael Blessing, Mary Blessing, and Gustave Reith, — for answer to the complaint of plaintiff herein allege:

1st. That they and each of them have no knowledge or information sufficient to form a belief as to each and every of the allegations in paragraphs 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18 in said complaint, and each of said paragraphs.

2nd. They and each of them deny every allegation in paragraphs 19, 20 and 21 of said complaint.

For an affirmative answer to said complaint, said defendants allege:

1st. That defendants Michael Blessing and Mary Blessing and their grantors and lessors, are now, and have been in the actual, open, notorious and exclusive possession of lots 3 & five and the S. W. quarter of the N. E. quarter and the S. E. quarter of the N. W. quarter of section six, township 25, north range 45 E. W. M., except a strip of land parallel with the Northern Pacific Railroad tract, 50 feet from said tract on one side thereof, and 75 feet from the other side thereof, being 125 feet wide, continuously since on or about 7" day of January, 1878, under color and claim of title made in good faith, and have paid all taxes legally assessed on said lands.

2nd. That plaintiff, or its grantors, or predecessors have not been seized or possessed of the said premises or any portion thereof, except said 125 feet strip, within ten years before the commencement of this suit.

3rd. That said Blessings are only in possession of said above mentioned lands as tenants of one John Kildea, administrator of the estate of James Laughlin, deceased.

25 And for a second affirmative answer to said complaint defendants allege:

1st. Defendants Marvin Arnold and Julia Arnold and Gustave Reith and their grantors and lessors, are now, and have been in the actual, open, notorious and exclusive possession of the following land in said county and State, to-wit, lots 8 and 9 in block 1 in Saunders' addition to Spokane City, continuously since about the 30th day of April, A. D. 1877, under color and claim of title, made in good faith, and have paid all taxes legally assessed on said lands.

2nd. That plaintiff, or its grantors, or predecessors have not been

seized or possessed of the said premises or any part thereof within ten years before the commencement of this action.

And for a third affirmative answer to said complaint defendants allege: That the cause of action set forth in plaintiff's complaint herein did not accrue against these defendants, or either of them or at all, within ten years before the commencement of this action.

And for a fourth affirmative answer to said complaint allege:

That there is a misjoinder of parties defendant in that the several defendants have possession of and claim title to separate and distinct legal subdivisions of land, and claim the same separately and not jointly as alleged in said complaint.

Wherefore, these defendants pray that plaintiff take nothing by its action, and that they go hence without a day, and for judgment against plaintiff for their costs and disbursements in this behalf expended and incurred.

HYDE & DAWSON,
Attorneys for Defendants.

THE STATE OF WASHINGTON, } ss:
County of Spokane, }

Before the subscriber personally appeared Gustave Reith, who being by me first duly sworn on oath deposes and says: That I am one of the defendants named in the above entitled action; that I have read the foregoing answer and that the matters and things therein contained are true as I verily believe.

26

GUSTAVE REITH.

Subscribed and sworn to before me this 18 day of March, A. D. 1899.

DAVID HERRMAN,
Notary Public, Residing at Spokane, Wash.

Copy of above answer received this 18 day of March, 1899.

STEPHENS & BUNN,
Att'ys for Plaintiff.

Filed Oct. 30 1899 at 2:10 o'clock p. m.

JAMES A. DRAIN, *Clerk.*
E. G. DRAIN, *Deputy.*

STATE OF WASHINGTON, } ss:
County of Spokane, }

In the Superior Court.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff, *vs.* WILLIAM S. ELY ET AL. } No. —. Answer.

For answer to the plaintiff's amended complaint in the above entitled cause, the defendants Henry A. Willey and Sarah A. Willey allege that they are in possession of lots six (6) and seven (7) in block one (1) of Saunders' addition to Spokane Falls (now Spokane) according to the plat thereof of record in the office of the auditor of said county of Spokane, State of Washington, as tenants of the Northwestern and Pacific Hypotheekbank (Northwestern and Pacific Mortgage Company) a corporation, one of the defendants in the above entitled cause and not otherwise; that they are not in possession and claim no right title or interest in any other property described in the complaint; that they claim the right of possession of the property above described as tenants of the Northwestern and Pacific Hypotheekbank (Northwestern and Pacific Mortgage Company) a corporation, aforesaid, and no other right thereto, except as such tenants.

Wherefore these defendants pray to be dismissed from this action with their costs.

BLAKE & POST,
Attorneys for said Defendants.

27 STATE OF WASHINGTON, } ss:
County of Spokane, }

Henry A. Willey being duly sworn says he is one of the defendants in the above entitled action; that he has read the foregoing answer, knows the contents thereof and believes the same to be true.

HENRY A. WILLEY.
S. A. WILLEY.

Subscribed and sworn to before me this 25 day of February, 1899.

D. M. THOMPSON,
Notary Public, Residing at Spokane, Washington.

Due and personal service of the within answer is hereby admitted at Spokane, Washington this 25" day of February, 1899.

STEPHENS & BUNN,
Attorney- for Pl'ff.

Filed Oct. 30 1899 at 10:35 o'clock a. m.

JAMES A. DRAIN, *Clerk.*
R. A. KOONTZ, *Deputy.*

28 STATE OF WASHINGTON, *County of Spokane,* } ss:

In the Superior Court,

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff, *vs.* WILLIAM S. ELY, GEORGE MILLER, ET AL., Defendants. | No.—. Amended Answer of Defendants Claribel Kaufman and Isaac Kaufman.

Defendants Claribel Kaufman and Isaac Kaufman for their joint amended answer herein,

1. Deny that the real estate mentioned in paragraph thirteen of the amended complaint to wit, the northwest quarter of the northwest quarter of section twenty (20) in township twenty-five (25) north of range forty-three (43) E. W. M. was wrongfully platted as a part of Saunder's addition to the city of Spokane Falls, as alleged in said paragraph, but admit that the same was platted as a part of said addition.

2. Deny each and every allegation, matter and thing contained in paragraphs fourteen, fifteen, sixteen, seventeen and twenty-one of said amended complaint.

3. Said defendants admit that they are in possession of a certain portion of the northwest quarter of the northwest quarter of said section twenty (20), which lies within two hundred feet of the main track of the Northern Pacific Railroad Company where the same passes adjacent to said tract of land through the city of Spokane, but deny that such possession is unlawful or wrongful.

4. Deny each and every allegation, matter and thing contained in paragraph twenty of said amended complaint, except the allegation that defendants Kaufman claim some right, title, interest or estate in and to certain portions of said real estate, which said defendants admit.

Counter Claim and Affirmative Answer.

Said defendants for an affirmative answer and by way of counter claim allege:—

1. That on and prior to the 12th day of May, 1877, the
29 following real estate, situate in the then Territory (now State) of Washington, was public land of the United States, and subject to entry under the homestead laws of the United States Government, to wit: the west half of the northwest quarter and the north half of the southwest quarter of section twenty (20) township twenty-five (25) north of range forty-three (43) E. W. M. That on the last aforesaid date Henry T. Cowley, being then and there a citizen of the United States, and the head of a family, and in every

way duly qualified to make entry of such lands, under the homestead laws, took up and entered said real estate as a homestead under said laws, filing his application therefor in the proper land office; and such further steps and proceedings were had therein that afterward, on the 3rd day of February, 1883, he made his final proof of said land and having paid the necessary and proper fees therefor received from the receiver a final receipt, and afterward, on December 30, 1884, a patent was issued by the United States Government to said Cowley for said lands under his homestead entry.

2. That from the date of his entry upon said lands as aforesaid, said Cowley continued to reside with his family and make his home, thereon continuously down to the present date, except that on or about the 15th day of March, 1883, he conveyed by warranty deed, in which his wife joined, the following portion of said lands to Frank R. Moore, to wit:—the northwest quarter of the northwest quarter and the north half of the north half of the southwest quarter of the northwest quarter of section twenty (20), township and range aforesaid.

3. That thereafter, on or about the 20th day of July, 1883, said Frank B. Moore laid off and platted into town lots and blocks designated as Saunders' addition to the city of Spokane Falls, all of said lands so conveyed to him by said Cowley as aforesaid, and by a plat thereof duly executed by himself and wife, according to the laws of the said Territory of Washington, dedicated the streets and alleys thereon indicated to the public, among which was and is Sprague street (now Sprague avenue) in the city of Spokane.

4. That said Sprague avenue is a public street seventy-five feet wide in the city of Spokane, the center of which is the section line running east and west between sections seventeen (17) and twenty (20), township and range aforesaid; and block number one (1) of said Saunders' addition so platted as aforesaid, is bounded on the north by said Sprague avenue, and is located in the northwest corner of the northwest quarter of said section twenty (20); lot number three (3) thereof being located near the corner of said block and abutting upon said street. That the northwest corner of said lot number three (3) is fifty feet east of the northwest corner of said block number one (1), the said lot fronting twenty-five feet upon said Sprague avenue and running back about one hundred and fifty-five feet and the greater portion of the same being within less than two hundred feet of the main track of the Northern Pacific railroad.

5. That on about the 7th day of March, 1888, the defendants Kaufman who were then and there husband and wife residing in said city became the owner in fee simple of said lot number three (3) in block number one (1) of said Saunders' addition as their community property under and by virtue of the execution and delivery of a warranty deed therefor to the defendant Claribel Kaufman by Sewell P. Channell, Ellen A. Channell, husband and wife, and Daniel W. Lane and Jennie E. Lane, husband and wife,

who were then and there the owners in fee simple thereof, through certain mesne conveyances from said Frank R. Moore and wife.

6. That immediately upon the conveyance of said lots to said defendants as aforesaid, they took the full, absolute and undisturbed possession thereof, under and pursuant to said deed of conveyance, and have ever since held and maintained the same, and have made lasting and valuable improvements thereon in the way of a dwelling house and a store room, to the aggregate amount of twelve hundred dollars; that said improvements were made long before the beginning of this action, said dwelling house having been built in the year 1889, and the store room a year or two later.

7. That during the period of eleven years last before the beginning of this action these defendants have been in the actual open and notorious possession of said lot under color and claim of
31 title; that neither the plaintiff nor its grantors or predecessors have been seized or possessed of said lot, or any part thereof, within more than ten years before the date of the commencement of this action.

8. That during said defendants' occupancy of said lot as herein alleged, said Sprague avenue has been opened up, graded, graveled and curbed by said city of Spokane at the expense of the abutting property thereon, and the defendants have been compelled to pay, and have paid a street grade assessment for such improvements to to the amount of $—; and said Sprague avenue is now and has been during the past eleven years, one of the principal public thoroughfares of said city, and at a point within less than one hundred feet of where the said lot abuts upon said street, the same crosses the main track of the Northern Pacific railroad at grade, and for the full period last aforesaid, said Sprague avenue has been dedicated to, used and accepted by the public as a public thoroughfare with the knowledge and consent of plaintiff, and the Northern Pacific Railroad Company mentioned in the amended complaint.

9. That during said defendants' occupancy of said lot as herein alleged they have been compelled to pay the general taxes levied thereon during that period, aggregating the sum of $—.

II.

Said defendants Claribel Kaufman and Isaac Kaufman, for a further and second affirmative answer to the amended complaint herein allege:—

1. That the cause of action set up in the amended complaint did not accrue within the last ten years immediately preceding the beginning of this action, and the same is therefore barred by the statute of limitations. That these defendants have been in the actual, open and notorious and adverse possession of said lot number three (3) in block number one (1) of Saunders' addition to the city of Spokane Falls (now Spokane), Spokane county, State of Washington,

according to the recorded plat thereof, under color and claim of title and a claim of absolute ownership of said property for more than ten years immediately preceding the commencement of this action; that neither the plaintiff nor its grantors or predecessors have
32 been seized or possessed of said premises in question, or any part thereof, within more than ten years before the date of the commencement of this action.

2. That said lot number three (3) in block number one (1) of said Saunders' addition is a part and parcel of the northwest quarter of the northwest quarter of section twenty (20), township twenty-five (25) north, range forty three (43) E. W. M., the greater portion of which lies within 200 feet of the main track of the Northern Pacific railroad.

III.

1. That they are the owners in fee and in possession of the following described real estate mentioned in the complaint, and lying within less than 200 feet of the track of the Northern Pacific Railway Company where it passes near the northwest corner of the northwest quarter of section twenty (20), township twenty-five (25) north, of range forty-three (43) E. W. M., Spokane county, State of Washington, more fully described according to number of lots and block as designated on the plat of Saunders' addition to the town of Spokane Falls now on file in the auditor's office of Spokane county as follows: Lot three (3) in block one (1) of said Saunders' addition to the town of Spokane Falls (now Spokane.) That long prior to the beginning of this action the plaintiff and its predecessor, the Northern Pacific Railroad Company, abandoned all that portion of its right of way as granted by the act of Congress July 2, 1864, included within the said lot, and have never used the same or made an attempt to use the same, for railroad purposes; nor have they, or either of them, ever objected to or dissented from defendants' claim of ownership thereof until the commencement of this action.

Wherefore defendants pray judgment:—

First. That plaintiff take nothing by this action.

Second. That they be adjudged the owner- in fee simple of said lot number three (3) in block number one (1) of Saunders' addition to the city of Spokane, free and clear of all incumbrances so far as the plaintiff is concerned, and that their title thereto be quieted and forever set at rest.

33 Third. And for all general relief to which they may be entitled in equity or at law, and for the costs and disbursements of this action.

BLAKE & POST,
Attorneys for Defendants Kaufman.

STATE OF WASHINGTON, } ss.:
County of Spokane, }

Isaac Kaufman being duly sworn says he is one of the defendants in the above entitled action: that he has read the foregoing amended answer, knows the contents thereof and believes the same to be true.

ISAAC S. KAUFMAN.

Subscribed and sworn to before me this 27th day of November, 1899.

THOMAS B. HIGGINS,
Notary Public, Residing at Spokane, Washington.

Filed Dec. 4, 1899 at 2 o'clock p. m.

JAMES A. DRAIN, *Clerk.*
E. G. DRAIN, *Deputy.*

34 STATE OF WASHINGTON, } ss.:
County of Spokane, }

In the Superior Court.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
WILLIAM S. ELY, GEORGE MILLER *et al.*, James McKenzie, Jennie McKenzie *et al.*, Defendants.
} No. —. Amended Answer of Jennie McKenzie.

Jennie McKenzie, defendant in the above entitled action, for her separate amended answer herein:

Denies that the real estate mentioned in paragraph 13 of the amended complaint, to wit: the northwest quarter of the northwest quarter of section twenty (20), in township twenty-five (25) north, range forty-three (43) E. W. M. was wrongfully platted as a part of Saunders' addition to the city of Spokane Falls, as alleged in said paragraph, but admits that the same was platted as a part of said addition.

2. Denies each and every allegation, matter and thing contained in paragraph- 14, 15, 16, 17 and 21 of said amended complaint.

3. Said defendant admits she and her husband, the defendant James McKenzie, are in possession of certain portions of the northwest quarter of the northwest quarter of said section 20, which lie within two hundred feet of the main track of the Northern Pacific Railroad Company, where the same passes adjacent to said tract of land through the city of Spokane, but denies that such possession is unlawful or wrongful.

4. Denies each and every allegation, matter and thing contained in paragraph 20 of said amended complaint, except the allegation that the defendants McKenzie claim some right, title interest or estate in and to certain portions of said real estate, which this defendant admits.

Affirmative Answer.

Said defendant for an affirmative answer to said amended complaint alleges that the cause of action set up therein did not
35 accrue within the last ten years immediately preceding the beginning of this action, and the same is therefore barred by the statute of limitations.

Counterclaim.

Said defendant, for a further affirmative answer, and by way of counterclaim alleges:

1. That on and prior to the 12th day of May, 1877, the following real estate, situate in the then Territory (now State) of Washington, was public land of the United States, and subject to entry under the homestead laws of the United States Government, to wit: The west half of the northwest quarter and the north half of the southwest quarter of section twenty (20), township twenty-five (25) north of range forty-three (43) E. W. M.; that on the last aforesaid date, Henry T. Cowley, being then and there a citizen of the United States, and the head of a family, and in every way duly qualified to make entry of such lands, under the homestead laws, took up and entered said real estate as a homestead, under said laws, filing his application therefor in the proper land office; and such further steps and proceedings were had therein, that afterward, on the 3rd day of February, 1883, he made his final proof to said lands, and having paid the necessary and proper fees, received from the receiver a final receipt there*ofr;* and afterward, on December 30th, 1884, a patent was issued by the United States Government to said Cowley for said lands, under his said homestead entry.

2. That from the date of his entry upon the said lands as aforesaid, said Cowley continued to reside with his said family and make his home thereon continuously down to the present date, except that on or about March 15th, 1883, he conveyed by warranty deed, in which his wife joined, the following portion of said lands, to Frank R. Moore, to wit:—The northwest quarter of the northwest quarter and the north half of the north half of the southwest quarter of the northwest quarter of section twenty (20), township and range aforesaid.

3. That thereafter, on or about July 20th, 1883, said Frank R. Moore, laid off and platted into town lots and blocks, desig-
36 nated as Saunders' addition to the city of Spokane Falls, all of said lands so conveyed to him by said Cowley, as afore-

said; and by a plat thereof duly executed by himself and wife, according to the laws of said Territory of Washington, dedicated the streets and alleys indicated thereon to the public, among which was and is Sprague street (now Sprague avenue), in the city of Spokane.

4. That said Sprague avenue is a public street seventy-five feet wide, in the city of Spokane, the center of which is the section line running east and west between sections seventeen (17) and twenty (20), township and range aforesaid, and block numbered one (1) of said Saunders addition, so platted as aforesaid, is bounded on the north by said Sprague avenue, and is located in the northwest corner of said northwest quarter of the said northwest quarter of said section twenty (20), lots numbered one (1) and two (2) thereof being in the northwest corner of said block and abutting upon said street.

5. That on or about the 22nd day of April, 1895, the defendant Jennie McKenzie, who was then unmarried and whose maiden name was Jennie Zeeck, became the owner in fee simple of said lots numbered one (1) and two (2) in block one (1) of said Saunders' addition, under and by virtue of the execution of a warranty deed therefor, to her by Sewell P. Channell and Ellen H. Cahannell, his wife, and Robert Hurlburt and Grace Hurlburt, his wife, who were then and there the owners in fee simple thereof, through certain mesne conveyances from said Frank R. Moore and wife.

6. That immediately upon the conveyance to said defendant Jennie McKenzie, of said lots as aforesaid, she took the full, absolute and undisturbed possession thereof, under and pursuant to said deed of conveyance, and has ever since held and maintained the same, and has made lasting and valuable improvements thereon in the way of a dwelling house, barn, out house, fencing, grading, sidewalks, &c., to the aggregate amount of $700.00.

7. That within two or three months after said defendant became the owner of said lots, as aforesaid, she intermarried with her co-defendant James McKenzie, and they then and there took their
37 residence on said property, and have made their home thereon ever since, and are still living and residing upon the same.

8. That during the period of fifteen years last past, before the beginning of this action this defendant has been in the actual open and notorious possession of said lots, under color and claim of title; that neither the plaintiff nor its grantors or predecessors have been seized or possessed of said premises, or any part thereof, within more than ten years before the date of the commencement of this action.

9. That during said defendant's occupancy of said lots, as herein alleged, said Sprague avenue has been opened up, graded and graveled and curbed, by said city of Spokane, at the expense of the abutting property thereon, and this defendant has been compelled to pay, and has paid, a street grade assessment for such improvements, to the amount of $170.00; and said Sprague avenue is now, and has been during the past fifteen years, one of the principal thoroughfares of said city, and at a point within less than one hun-

dred feet of where said lots abut upon said street, the same crosses the main track of said railroad, at grade, and, for the full period last aforesaid, said Sprague avenue has been dedicated to, and accepted and used by, the public as a public highway, with the knowledge and consent of plaintiff, and the Northern Pacific Railroad Company, mentioned in the complaint.

10. That during defendant's occupancy of said lots, as herein alleged, the defendant, Jennie McKenzie has paid all the general taxes levied thereon during that period, aggregating the sum of $700.00.

That, although the plaintiff and the said Northern Pacific Railroad Company have had full knowledge of all the facts and circumstances herein alleged ever since the occurrence thereof, neither of them has ever used or attempted to use any of the property in controversy for railroad purposes nor objected to nor dissented from defendant's claim of ownership thereof until the commencement of this action.

The defendant, Jennie McKenzie, for a further affirmative
38 answer herein alleges:

1. That she is the owner in fee and in possession of the following described real estate mentioned in the complaint, and lying within less than 200 feet of the track of the Northern Pacific Railway Company where it passes near the northwest corner of the northwest quarter of section twenty (20) township twenty-five (25) north of range forty-three (43) E. W. M., Spokane county, State of Washington, more fully described according to the number of lots and blocks as designated on the plat of Saunders' addition to the town of Spokane Falls, now on file in the auditor's office of Spokane county, as follows:—Lots one (1) and two (2) in block one (1) of said Saunders' addition to the town of Spokane Falls, now Spokane; that long prior to the beginning of this action the plaintiff and its predecessor, the Northern Pacific Railroad Company, abandoned all that portion of its right of way as granted by the act of Congress July 2, 1864, included within said lots, and have never used the same or made any attempt to use the same for railroad purposes; nor have they, or either of them ever objected to or dissented from defendants' claim of ownership thereof until the commencement of this action.

Said defendant for a further affirmative answer to the amended complaint herein, alleges:—

1. That the cause of action set up in the amended complaint did not accrue within the last ten years immediately preceding the beginning of this action, and the same is therefore barred by the statute of limitations; that this defendaut has been in the actual open, notorious and adverse possession of said lots one (1) and two (2) in block one (1) of Saunders' addition to the city of Spokane Falls, (now Spokane), Spokane county, State of Washington, according to the recorded plat thereof, under color and claim of title, and a claim of absolute ownership of said property for more than ten

years immediately preceding the commencement of this action; that neither the plaintiff nor its grantors or predecessors have been seized or possessed of the premises in question, or any part or parcel thereof, within more than ten years before the date of the commencement of this action.

39 Wherefore defendant prays judgment,

1. That plaintiff take nothing by this action,

2. That the defendant Jennie McKenzie be adjudged the owner in fee simple of said lots one (1) and two (2) in block one (1) of said Saunders' addition to the city of Spokane, free and clear of all encumbrances, or cloud upon the title, and that her title thereto be quieted.

3. And for all general relief to which said defendant may be entitled in equity or at law, and for the costs and disbursements of this action.

BLAKE & POST,
Attorneys for Defendant Jennie McKenzie.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Jennie McKenzie being duly sworn says she is one of the defendants in the above entitled action; that she has read the foregoing amended answer, knows the contents thereof and believes the same to be true.

JENNIE McKENZIE.

Subscribed and sworn to before me this 2nd day of December, 1899.

THOMAS B. HIGGINS,
Notary Public, Residing at Spokane, Washington.

Filed Dec. 4, 1899, at 2 o'clock p. m.
JAMES A. DRAIN, *Clerk.*
E. G. DRAIN, *Deputy.*

40 STATE OF WASHINGTON, } ss:
County of Spokane, }

In the Superior Court.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff, *vs.* WILLIAM S. ELY, GEORGE MILLER, *et al.*, Defendants.	No. —. Amended Answer of the Equitable Trust Company.

The Equitable Trust Company, a corporation, sued herein under the name of The Jennings Trust Company, for amended answer to the plaintiff's amended complaint herein.

1. Denies that the real estate mentioned in paragraph thirteen of the amended complaint to wit, the northwest quarter of the northwest quarter of section twenty (20) in township twenty-five (25) north of range forty-three (43) E. W. M. was wrongfully platted as a part of Saunders' addition to the city of Spokane Falls, as alleged in said paragraph, but admits that the same was platted as a part of said addition.

2. Denies each and every allegation, matter and thing contained in paragraphs fourteen, fifteen, sixteen and seventeen and twenty-one of said amended complaint.

3. Said defendant admits that it has an interest in a certain portion of the northwest quarter of the northwest quarter of said section twenty (20) which lies within two hundred feet of the main track of the Northern Pacific Railway Company, where the same passes adjacent to said tract of land, through the city of Spokane, but denies that such interest is unlawful or wrongful.

4. Denies each and every allegation, matter and thing contained in paragraph twenty of said amended complaint, except the allegation that defendant claims some right, title, interest or estate in and to certain portions of said real estate, which said defendants admits.

Counter Claim and Affirmative Answer.

Said defendant, for an affirmative answer, and by way of counter-claim alleges:—

41 1. That on and prior to the 12th day of May, 1877, the following real estate, situate in the then Territory (now State) of Washington was public land of the United States, and subject to entry under the homestead laws of the United States Government, to wit:—the west half of the northwest quarter, and the north half of the southwest quarter of section twenty (20) township twenty-five (25) north, of range forty three (43) E. W. M. That on the last aforesaid date Henry T. Cowley being then and there a citizen of the United States and the head of a family and in every way duly qualified to make entry of such land under the homestead laws, took up and entered said real estate as a homestead under said laws, filing his application therefor in the proper land office; and such further steps and proceedings were had therein that afterward, on the 3rd day of February, 1883, he made his final proof of said land, and having paid the necessary and proper fees therefor, received from the receiver a final receipt; and afterward on December 30, 1884, a patent was issued by the United States Government to said Cowley for said lands under his homestead entry.

2. That from the date of entry upon said lands as aforesaid, said Cowley continued to reside with his family and make his home thereon continuously down to the present date, except that on or about the 15th day of March, 1883, he conveyed by warranty deed, in which his wife joined, the following portion of said lands to Frank R. Moore,

to wit:—the northwest quarter of the northwest quarter, and the north half of the north half of the southwest quarter of the northwest quarter of section twenty (20), township and range aforesaid.

3. That thereafter, on or about the 20th day of July, 1883, said Frank R. Moore laid off and platted into town lots and blocks designated as Saunders' addition to the city of Spokane Falls, all of said lands so conveyed to him by said Cowley as aforesaid, and by a plat thereof duly executed by himself and wife according to the laws of the said Territory of Washington dedicated the streets and alleys thereon indicated to the public, among which was and is Sprague street (now Sprague avenue) in the city of Spokane.

42 4. That said Sprague avenue is a public street seventy-five feet wide in the city of Spokane, the center of which is the section line running east and west between sections seventeen (17) and twenty (20), township and range aforesaid, and block number one (1) of said Saunders' addition, so platted as aforesaid, is bounded on the north by said Sprague avenue and is located in the northwest corner of the northwest quarter of said section twenty (20); lot number three (3) thereof being located near the corner of said block and abutting upon said street; that the northwest corner of said lot number three is fifty feet east of the northwest corner of said block number one (1) the said lot fronting twenty-five (25) feet upon Sprague avenue and running back about one hundred and fifty-five (155) feet, the greater portion of the same being within less than two hundred feet of the main track of the Northern Pacific railroad.

5. That on or about the 7th day of March, 1888, the defendants Kaufman, who were then and there husband and wife residing in said city, became the owners in fee simple of said lot number three (3) in block number one (1) of said Saunders' addition as their community property under and by virtue of the execution and delivery of a warranty deed therefor to the defendant Calibel Kaufman by Sewell P. Channell, Ellen A. Channell, husband and wife, and Daniel W. Lane and Jennie E. Lane, husband and wife, who were then and there the owners in fee simple thereof, through certain mesue conveyances from said Frank R. Moore and wife.

6. That immediately upon the conveyances of said lots to said defendants Kaufman as aforesaid, they took the full, absolute and undisturbed possession thereof under and pursuant to said deed of conveyance, and have ever since held and maintained the same, and have made lasting and valuable inprovements thereon in the way of a dwelling house and a store room to the aggregate amount of twelve hundred dollars: That said improvements were made long before the beginning of this action, said dwelling house having been built in the year 1889 and the store-room a year or two later.

43 7. That during the period of eleven years last past before the beginning of this action said defendants Kaufman have been in the actual, open and notorious possession of said lot under color and claim of title; that neither the plaintiff nor its grantors or

predecessors have been seized or possessed of said lot, or any part thereof within more than ten years before the date of the commencement of this action.

8. That during said defendants Kaufman's occupancy of said lot as herein alleged said Sprague avenue has been opened up, graded graveled and curbed by said city of Spokane at the expense of the abutting property thereon, and said defendants have been compelled to pay and have paid a street grade assessment for such improvements to the amount of $—; and said Sprague avenue is now and has been during the past fifteen years one of the principal public thoroughfares of said city, and at a point within less than one hundred feet of where the said lot abuts upon said street the same crosses the main track of the Northern Pacific railroad at grade; and for the full period last aforesaid said Sprague avenue has been dedicated to and used and accepted by the public as a public thoroughfare with the knowledge and knowledge and consent of plaintiff and the Northern Pacific Railroad Company, mentioned in the amended complaint.

9. That during said defendants Kaufman's occupancy of said lot as herein alleged, they have been compelled to pay the general taxes levied thereon during that period, aggregating the sum of $—.

10. That afterward, on or about the 2nd day of November, 1891, the defendants Kaufman made, executed and delivered to one J. W. Campbell a mortgage upon said lot number three (3) in block number one (1) of said Saunders' addition, to secure the payment of a debt of $2,240 with interest, which debt remains wholly unpaid except that a portion of said interest has been paid. That said mortgage and debt secured thereby was afterwards assigned, transferred and set over by said Campbell to this defendant whose name at that time was the Jennings Trust Company, but has since
44 been changed to the Equitable Trust Company, and who is now the owner and holder thereof.

Affirmative Answer.

I.

Said defendant for a further affirmative amended answer to the amended complaint herein alleges:

1. That the cause of action set up in the amended complaint did not accrue within the last ten years immediately preceding the beginning of this action, and the same is therefore barred by the statute of limitations. That the defendants Kaufman have been in the actual, open, notorious and adverse possession of said lot number three (3) in block number one (1) of Saunders' addition to the city of Spokane Falls (now Spokane), Spokane county, State of Washington, according to the recorded plat thereof, under color and claim of

title and a claim of absolute ownership of said property for more than ten years immediately preceding the commencement of this action; but neither the plaintiff nor its grantors or predecessors have been seized or possessed of said premises in question, or any part thereof, within more than ten years before the date of the commencement of this action.

2. That said lot number three (3) in block number one (1) of said Saunders' addition is part and parcel of the northwest quarter of the northwest quarter of section twenty (20), township twenty-five (25) north, of range forty-three (43) E. W. M., the greater portion of which lot lies within two hundred feet of the main track of the Northern Pacific railroad.

3. That on or about the 2nd day of November, 1891, the defendants Kaufman made, executed and delivered to one J. W. Campbell a mortgage upon said lot number three (3) in block number one (1) of Saunders' addition, to secure the payment of a debt of $2,240 with interest, which debt remains wholly unpaid except that a portion of the interest has been paid. That said mortgage and the debt secured thereby was afterward assigned, transferred and set over by said Campbell to this defendant whose name at that time was the
45 Jennings Trust Company, but has since been changed to the Equitable Trust Company, and who is now the owner and holder thereof.

II.

For a further amended answer to the amended complaint herein, the defendant Equitable Trust Company alleges:

1. That it is the owner in fee and in possession of the following described real estate mentioned in the complaint, and lying within less than 200 feet of the track of the Northern Pacific Railway Company where it passes near the northwest corner of the northwest quarter of section twenty (20), township twenty-five (25) north, of range forty-three (43) E. W. M. Spokane county, State of Washington, more fully described according to number of lots and blocks as designated on the plat of Saunders' addition to Spokane Falls now on file in the auditor's office in said county as follows: Lot number three (3) of block number one (1) of said Saunders' addition to the town of Spokane Falls (now Spokane;) that long prior to the beginning of this action the plaintiff and its predecessor, the Northern Pacific Railroad Company, abandoned all that portion of its right of way as granted by the act of Congress of July 2, 1864, included within the said lot, and have never used the same or made any attempt to use the same for railroad purposes; nor have they, or either of them, ever objected to or dissented from defendant's claim of ownership thereof until the commencement of this action.

Wherefore said defendant prays judgment,

First. That plaintiff take nothing by this action.

Second. That defendants Kaufman be adjudged the owners in fee simple of said lot subject to this defendant's said mortgage.

Third. And for all general relief to which it may be entitled, either in equity or at law, and for all costs and disbursements of this action.

_____,

Attorneys for Defendant The Equitable Trust Company.

46 STATE OF WASHINGTON, } ss:
County of Spokane, }

R. B. Blake being first duly sworn says he is one of the attorneys for the defendant Equitable Trust Company in the above entitled action; that he has read the foregoing amended answer, knows the contents thereof and believes the same to be true.

That said defendant Equitable Trust Company is a foreign corporation having no officers in this State, and affiant being one of its attorneys in this action makes this affidavit on its behalf.

R. B. BLAKE.

Subscribed and sworn to before me this 28th day of November, 1899.

THOMAS B. HIGGINS,
Notary Public, Residing at Spokane, Washington.

Filed Dec. 4 1899 at 2 o'clock p. m.

JAMES A. DRAIN, *Clerk.*
E. G. DRAIN, *Deputy.*

47 STATE OF WASHINGTON, } ss:
County of Spokane, }

In the Superior Court.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff, vs. WILLIAM S. ELY ET AL., Defendants. } No. —.

Amended Answer of Defendant Northwestern and Pacific Hypotheekbank.

For amended answer to plaintiff's amended complaint in the above entitled action the defendant, The Northwestern and Pacific Hypotheekbank (Northwestern and Pacific Mortgage Company) a corporation,

1. Denies each and every allegation contained in paragraph eleven of said amended complaint.

2. Denies each and every allegation contained in paragraph twelve of said amended complaint.

3. Denies that the real estate mentioned in paragraph thirteen of said amended complaint, to wit, the northwest quarter of the northwest quarter of section twenty (20) in township twenty-five (25) north of range forty-three (43) E. W. M. was wrongfully platted as a part of Saunders' addition to the city of Spokane Falls, as alleged in said paragraph; but admits that the same was platted as a part of said addition. Also denies that the south half of the northeast quarter of section twenty-four (24) in township twenty-five (25) north of range forty-two (42) E. W. M. was wrongfully platted as a part of Cannon's addition to the city of Spokane Falls, but admits that the same was platted as a part of Cannon's addition. Also denies that the north one-half of the northeast quarter of section twenty-four (24) in township twenty-five (25) north, of range forty-two, E. W. M. was wrongfully platted as a part of Browne's addition to the city of Spokane Falls; but admits that the same was platted as a part of Browne's addition. Also denies that the southeast quarter of the southeast quarter of section eighteen (18) in township twenty-five (25) north, of range forty-three (43) E. W. M., was wrongfully platted as a part of Havermale's addition to the city of Spokane Falls; but admits that the same was platted as a part of said addition.

48 4. Denies each and every allegation contained in paragraph fourteen of said amended complaint.

5. Denies each and every allegation contained in paragraph fifteen of said amended complaint.

6. Denies each and every allegation contained in paragraph sixteen of said amended complaint.

7. Denies each and every allegation contained in paragraph seventeen of said amended complaint.

8. Denies each and every allegation contained in paragraph nineteen of said amended complaint, except that defendant admits that it is in possession of lots six (6) and seven (7) in block one (1) of Saunders' addition to Spokane Falls, mentioned in the amended complaint, which is a portion of the northwest quarter of the northwest quarter of section twenty (20), township twenty-five (25) north, of range forty-three (43) E. W. M. a part of which said two lots lie within two hundred feet of the main track of the railroad, mentioned in said amended complaint, where the same passes adjacent to the said tract of land, through the city of Spokane, but denies that such possession is unlawful or wrongful.

9. Defendant denies each and every allegation contained in paragraph twenty of said amended complaint, except the allegation that the defendant claims some right, title, interest or estate in and to certain portions of said real estate, which this defendant admits, which portion of real estate this defendant has and claims to have title to, being lots six (6) and seven (7) in block one (1) of said Saunders' addition to Spokane Falls (now Spokane), according to the recorded plat thereof, on file in the office of the auditor of Spokane county, Washington.

10. Defendant denies each and every allegation contained in paragraph twenty-one of said amended complaint.

II.

For further amended answer and by way of affirmative defense to said amended complaint this defendant alleges:

That the cause of action set up in the amended complaint did not accrue within the last ten years immediately preceding the commencement of this action, and the same is barred by the statute of limitations; that the defendant, and its grantors, have been in open, notorious and adverse possession of said lots six (6) and seven (7) of block one (1) of Saunders' addition to Spokane Falls aforesaid, according to the recorded plat thereof, under color and claim of title, and a claim of absolute ownership of the said property, for more than ten years immediately preceding the commencement of this action. That neither the plaintiff nor its grantors nor predecessors have been seized or possessed of said premises, or any part thereof, within more than ten years before the commencement of this action.

III.

For further answer, and by way of affirmative defense and counter-claim this defendant alleges:—

1. That it is and was all the times herein mentioned a corporation organized under the general laws of the Kingdom of the Netherlands, and lawfully doing business in the State of Washington.

2. That on and prior to the 12th day of May, 1879, the following real estate, situate in the then Territory (now State) of Washington, was public land of the United States Government, to-wit, the west half of the northwest quarter and the north half of the southwest quarter of section twenty (20), township twenty-five (25), north of range forty-three (43) east of the Willamette meridian. That on May 12, 1879, Henry T. Cowley, being then and there a citizen of the United States and the head of a family and in every way duly qualified to make entry of such lands under the homestead laws of the United States, took up and entered said real estate as a homestead under said laws, filing his application therefor in the proper land office, and such other steps and proceedings were had therein that afterwards, on the 3rd day of February, 1883, he made his final proof of said lands, and having paid the necessary and proper fees therefor received from the receiver of the land office of the United States Government a final receipt therefor, and afterwards and on December 30, 1884, a patent was issued by the United States Government to said Cowley for said land under his said homestead entry.

That from the date of his entry upon said lands as aforesaid, said Cowley continued to reside with his family and make his home thereon continuously down to the present date, except that on

March 15, 1883, he conveyed by warranty deed, in which his wife joined, the following portions of said lands to Frank R. Moore; the northwest quarter of the northwest quarter and the north half of the north half of the southwest quarter of the southwest quarter of section twenty (20) aforesaid.

4. That said Frank R. Moore took possession of said lands at the date of said conveyance, and remained in possession thereof ever since except as hereinafter stated; that on July 20, 1883, said Frank R. Moore and S. Frances Moore, his wife, laid off and platted into town lots and blocks in the manner provided by the statutes of the Territory of Washington, designated as Saunders' addition to Spokane Falls, all of said lands so conveyed to him by said Cowley by a plat thereof duly executed by his *wife* and wife according to law, and dedicated the streets and alleys indicated thereon to the public, among which was and is Sprague street (now Sprague avenue) in said Spokane Falls.

5. That said Sprague street (now Sprague avenue) is and has been ever since a public street seventy-five feet wide, the center of which is the section line running east and west between sections seventeen and twenty, township and range aforesaid; and block one of said Saunders' addition so platted is bounded on the north by said street, and is located in the northwest corner of the northwest quarter of said section twenty (20) and said lots six (6) and seven (7) adjoin one another, and are respectively twenty-five feet in width, by about one hundred and fifty feet in length; said lot seven lying easterly of said lot six, said lots running north and south, and the westerly boundary of said lot six being one hundred and twenty-five feet west of the westerly side of said block one; that a part of said lots six and seven are within what plaintiff claims to be its right of way mentioned in the amended complaint herein.

51 6. That on or about February 9, 1884, said Frank R. Moore and said S. Frances Moore, his wife, conveyed by good and sufficient warranty deeds of conveyance and undivided one-third interest in said lots six and seven to Sewell P. Channell; an undivided one-third interest in said lots to Robert F. Hurlburt, and an undivided one-third interest in said lots to Willard P. Andrus, which deeds are of record in the office of the auditor of Spokane county, in Book F. of Deeds, at pages 143, 144 and 145 respectively; and said grantees at the time of the execution of said deeds and the delivery thereof to them respectively took possession of said lots and the whole thereof. That on November 17, 1884, said Willard P. Andrus and wife conveyed by deed their undivided one-third interest in and to said lots six and seven to said Channell and Hurlburt, which deed is of record in said auditor's office in Book F. of Deeds at page 741. That on July 8 1885, said Channell and Hurlburt with their wives joining, conveyed by deed to Elizabeth Richardson said lot numbered six, which deed is of record in said auditor's office in Book J " of Deeds, at page " 327." That said Richardson and husband on March 17, 1886, conveyed by deed said lot numbered six to Matthew

Hayden, which deed is of record in said auditor's office in Book "K" of Deeds at page "427." That said Hurlburt and wife conveyed by deed to Daniel W. Lane an undivided one-third of said lot seven on May 17 1886, which deed is of record in said auditor's office in Book "L" of Deeds at page "176." That said Channell and Hurlburt and Lane *and their wives, on February 10, 1887,* conveyed by deed said lot numbered seven to said Matthew Hayden, which deed is of record in said auditor's office in Book "O" of Deeds at page "353." That said Matthew Hayden and wife conveyed by deed said lots numbered six and seven on December 26, 1889, to Lucy A. Simms, which deed is of record in the auditor's office of said county in Book "15" of Deeds at page "278." That at the time of conveyance as aforesaid to Lucy A. Simms, she was married her husband's name being John A. Simms; that thereafter, and in September 1890, said John A. Simms died intestate without issue, and all right, title and interest he had in said property descended under the
52 statutes of the State of Washington to said Lucy A. Simms.

That in this court, on or about September 16, 1890, and in the matter of the probate of the said estate of said John A. Simms, said Lucy A. Simms was appointed administratrix thereof; and thereafter such proceedings were had that in the year 1891, said estate was settled and a final decree of distribution was made in the above entitled court, vesting all right, title and interest of said John A. Simms in and to all property in which he had any interest in said Lucy A. Simms. That as a matter of fact said Lucy A. Simms held title to said lots six and seven as her separate property from the time it was conveyed to her as above stated until the same was vested in this defendant as hereinafter stated, and said John A. Simms had no interest therein, the same not being the community property of said John A. Simms and said Lucy A. Simms.

That on August 21, 1891, this defendant loaned said Lucy A. Simms the sum of twenty-five hundred ($2500) dollars, and she gave as security therefor her promissory note for that amount payable three years after date, and her indenture of mortgage in writing executed in the manner required by law, which was filed for record in the office of the auditor of said county on said date and recorded in volume 29 of mortgages at page 178, which mortgage conveyed to this defendant as such security said lots six and seven. That thereafter said Lucy A. Simms, having failed to pay said mortgage indebtedness and being in default therefor, this defendant on or about November 7, 1895, commenced an action in this court against said Lucy A. Simms to foreclose said mortgage. That said Lucy A. Simms has never since the execution of said mortgage made any other conveyance of said property or any part thereof. That said action is numbered 10218. That summons was duly and personally served upon said defendant; that said defendant appeared in said action, and thereafter such proceedings were had that on January 13, 1896, a decree was entered therein, which decree gave this defendant judgment against said Lucy A. Simms, for the sum

of $3,237.70 and provided for the sale of said lots six and seven for the payment thereof in the usual manner. That thereafter said property was sold in the manner provided
53 by law by the sheriff of Spokane county under said decree, execution and order of sale issued thereon by the clerk of said court to this defendant for the sum of $3000, said sale taking place on or about February 14, 1896; and the sheriff of said county issued his certificate therefor to this defendant, which certificate is recorded in said auditor's office in Book "66" of Deeds at page "237." That thereafter and on or about the 16th day of March, 1896, the said sale was duly confirmed by order of this court in said action. That thereafter and on or about February 19, 1897, no redemption having been made from said sale, the sheriff of said county executed and delivered, in writing, a good and sufficient deed of said property under and by virtue of said foreclosure and sale to this defendant, which was filed for record in the office of the auditor of said county, on February 27, 1897, and recorded on Book "81" of Deeds at page "628." That ever since the sale of said property to this defendant it has been and now is, the owner thereof.

7. That immediately upon the conveyance to Elizabeth Richardson as aforesaid, she took the full, absolute and undisturbed possession of the property so conveyed under and pursuant to said deed of conveyance and held and maintained the same until she conveyed the same as aforesaid. That in the year 1885, and in the year 1886 said Richardson made lasting and valuable improvements upon said property so conveyed to her and upon that portion thereof claimed by plaintiff herein to be within the boundaries of its right of way by the erection of a dwelling house and by way of grading and construction of sidewalks etc.

8. That immediately upon the conveyance to Matthew Hayden of said lots as aforesaid, he took the full, absolute and undisturbed possession thereof, under and pursuant to said deed of conveyance and held and maintained the same until he conveyed the same to Lucy A. Simms, as heretofore mentioned. That in the year 1887, and after said conveyance to him, said Hayden made lasting and valuable improvements upon said property and upon that
54 part thereof which plaintiff herein claims to be within the boundaries of its right of way, by the erection of a dwelling house and by way of grading and construction of sidewalks etc. to the aggregate amount of about $—.

9. That immediately upon the conveyance to said Lucy A. Simms of said lots as aforesaid, she took the absolute and undisturbed possession thereof under and pursuant to said deed of conveyance, and has ever since held and maintained the same up to the date when the defendant herein took possession under the decree of foreclosure above mentioned; and said Lucy A. Simms made lasting and valuable improvements upon said property and upon that part thereof claimed by plaintiff.

10. That the defendant herein immediately upon the sale of said

preperty to it under said decree of foreclosure took the absolute and undisturbed possession thereupon under and pursuant to said mortgage decree of foreclosure and sale, and has ever since held and maintained the same. That for more than twelve years before the commencement of this action said Richardson, said Matthew Hayden, Lucy A. Simms and this defendant, each during the time that he was entitled to possession thereof as respect to the others as above stated, have been in the absolute, actual, open, notorious and undisturbed possession of said lots under color and claim of title; that said possession has been open, notorious and adverse to the rights of this plaintiff and the Northern Pacific Railroad Company and all others. That during all of said time said dwelling house erected thereon in 1887 has been occupied by the above named parties respectively. That neither the plaintiff nor its grantors or predecessors have been seized or possessed of said premises, or any part or parcel thereof, within more than ten years before the date of the commencement of this action.

11. That during the occupancy of said lots by said parties as above stated said Sprague street has been opened up, graded and graveled and curbed by said city of Spokane at the expense of the abutting property thereon, and said parties have been compelled to pay and have paid a street grade assessment for such improvements to the amount of $—, and said Sprague avenue *has* now and has been during the last fifteen years one of the principal thoroughfares of said city. That Sprague avenue crosses plaintiff's alleged right of way, and for the full period of at least fifteen years last past said Sprague avenue has been dedicated to and accepted and used by the public as a public highway with the knowledge and consent of plaintiff and the Northern Pacific Railroad Company mentioned in the amended complaint.

12. That ever since the platting of said Saunders' addition of said lots six and seven and the whole thereof, said lots have been assessed as lots by the city of Spokane and by the county of Spokane, aforesaid, for the purpose of general taxation, and during the occupancy of said Hayden upon said lots as hereinbefore alleged said Hayden paid out as general taxes thereon during that period the said sum of $—. That during the occupancy of said Lucy A. Simms, of said lots as hereinbefore alleged, she paid the general taxes thereon aggregating the sum of $—. That during the occupancy of said Elizabeth Richardson of said lots as hereinbefore alleged she paid out general taxes levied thereon aggregating the sum of $—. That since that time the defendant herein has been compelled to pay and did pay the general taxes levied thereon aggregating the sum of $—. That neither the Northern Pacific Railroad Company nor this plaintiff has paid any of the general taxes levied upon said lots, or either of them or any part thereof.

IV.

For a further amended answer to the amended complaint herein,

the defendant Northwestern and Pacific Hypotheekbank (Northwestern and Pacific Mortgage Company) a corporation, alleges:—

1. That it is the owner in fee and in possession of the following described real estate mentioned in the complaint, and lying within less than 200 feet of the track of the Northern Pacific Railway Company where it passes near the northwest corner of the northwest quarter of section twenty (20) township twenty-five (25) north, of range forty-three (43) E. W. M., Spokane county, State of Washington, more fully described according to number of lots and blocks as designated on the plat of Saunders' addition to Spokane Falls
56 now on file in the auditor's office of said county, as follows:

Lots six (6) and seven (7) of block one (1) of said Saunders' addition to the town of Spokane Falls (now Spokane) that long prior to the beginning of this action the plaintiff and its predecessors, the Northern Pacific Railroad Company, abandoned all that portion of the right of way as granted by the act of Congress July 2, 1864, included within the said lot, and have never used the same or made any attempt to use the same for railroad purposes; nor have they or either of them, ever objected to or dissented from defendant's claim of ownership thereof until the commencement of this action.

Wherefore defendant prays judgment.

First. That plaintiff take nothing by this action.

Second. That this defendant be adjudged the owner in fee simple of said lots six and seven in block one of said Saunders' addition free and clear of all incumbrances or cloud upon the title, and that its title thereto be quieted, and that it be adjudged to have the right of possession of said lots as against the plaintiff.

Third. For all general relief to which said defendant may be entitled in equity or at law, and for the costs and disbursements of this action.

BLAKE & POST,
Attorneys for said Defendant.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Thomas G. Thomson, being first duly sworn, deposes and says: That he is the manager and attorney in fact of the defendant The Northwestern and Pacific Hypotheekbank (Northwestern and Pacific Mortgage Company) in the above entitled action, and makes this verification for and on its behalf; that he has read the foregoing amended answer, knows the contents thereof and believes the same to be true.

THOMAS GEORGE THOMSON.

Subscribed and sworn to before me this 28th day of November, 1899.

THOMAS B. HIGGINS,
Notary Public for the State of Washington,
Residing at Spokane.

Filed Dec. 4 1899 at 2 o'clock p. m.
JAMES A. DRAIN, *Clerk.*
E. G. DRAIN, *Deputy.*

57 STATE OF WASHINGTON, } ss:
County of Spokane, }

In the Superior Court.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
WILLIAM S. ELY, GEORGE MILLER, ET AL., Defendants.
} #—. Answer.

Joseph B. Goodner and Sallie Goodner, defendants in the above entitled action, for their amended answer herein:

1. Deny each and every allegation, matter and thing contained in paragraphs 14, 15, 16, 17 and 21 of plaintiff's amended complaint.

2. Said defendants admit that they are in possession of certain portions of the southeast quarter of section thirty-two (32) township twenty-six (26), north range (45) E. W. M. which lie within two hundred feet of the main track of the Northern Pacific Railroad Company where the same passes adjacent to said tract of land through the county of Spokane, but deny that such possession is unlawful or wrongful.

3. Deny each and every allegation, matter and thing contained in paragraph 20 of said amended complaint, except the allegation that defendants Goodner claim some right, title, interest or estate in and to certain portions of said real estate, which these defendants admit.

Affirmative Answer.

Said defendants for a further and affirmative answer to said amended complaint allege:

1. That these defendants are now and have been during all the times herein mentioned husband and wife, living and residing in the county of Spokane, State of Washington.

2. That on and prior to the first day of June, 1879, the following real estate situate in the then Territory (now State) of Washington was public land of the United States, and subject to entry under the homestead laws of the United States Government, to wit:—The southeast quarter of section thirty-two (32) in township twenty-six (26) north, range forty-five (45) E. W. M.; that on or
58 about the last aforesaid date, one James L. Clagg being then and there a citizen of the United States, and the head of a family, and in every way duly qualified to make entry of such lands under the homestead laws, settled upon the above described real estate, which was then surveyed, and made valuable and lasting improvement thereon to the amount and value of $600.00; that there-

after on the 7th day of September, 1880, and before said lands were surveyed, said Clegg bargained and sold his said improvements upon said land, and his right of possession thereof, to these defendants, who then and there pursuant to such purchase and sale took the absolute and full possession thereof, and have mantained and held such possession continuously to the present time.

3. That said lands were surveyed by the United States Government and became subject to entry under the homestead laws of the Government on August 31st, 1880; and thereafter on the — day of ——, 18— the defendant Joseph B. Goodner, who was then and there a citizen of the United States, and the head of a family, and in every — duly qualified to make entry of such lands under the homestead laws, took up and entered said real estate as a homestead, under said laws, filing his application therefor in the proper land office; and such further steps and proceedings were had therein, that afterward on the 16th day of November, 1883, he made final proof of said lands, and having paid the necessary and proper fees, received from the receiver, a final receipt therefor, and afterward on the 21st day of August, 1884, a patent was issued by the United States Government to said Goodner for said lands under his homestead entry, the same having been commuted by reason of his service as a soldier.

4. That said Clegg from the date of his entry and settlement upon said lands, as aforesaid, down to the date of his improvements to defendants, as aforesaid, made his home and lived thereon with his family; and from the latter date down to the present time, the defendants have lived and made their home thereon continuously.

5. That during said Clegg's possession and occupancy of said lands as aforesaid, he enclosed a large portion thereof with a
59 substantial fence, one line of which fence was built parallel with, and about fifty feet north of the line upon which the Northern Pacific Railroad track was afterward built and constructed, and where said track has ever since remained and still remain-located.

6. That after these defendants came into the possession of said lands, said fence was maintained at the same place until some time in 1895, when the same was destroyed by fire from the locomotive of said railroad company; that during the whole period from the date of the taking possession by these defendants, as aforesaid, down to the time said fence was destroyed by fire, they occupied, farmed, cultivated, and had full and absolute possession of all of the said lands lying north of said fence in said tract, including that portion thereof which is now claimed by plaintiff as a part of its right of way; that since the destruction of the said fence, as aforesaid, these defendants have farmed, cultivated, occupied and held the open and notorious possession of said land in the same way.

7. That after defendants took possession of said tracts of lands as aforesaid, and more than ten years prior to the beginning of this action, they enclosed a large portion thereof with a substantial fence,

one line of which fence was built parallel with and about fifty feet south of said railroad track where the same was then and still is located; that these defendants have ever since maintained said *fence, and have occupied, farmed, cultivated and had full and absolute* possession of all said tract of land lying south of said fence, including that portion thereof which is now claimed by plaintiff as part of its right of way.

8. That during the period of more than fifteen years last past before the beginning of this action, these defendants, under color and claim of title, and a claim of absolnte ownership, have been in the actual, open and notorious possession of all that portion of said tract of land lying north, of the line upon which said fence was constructed by said Clegg, as aforesaid, as well as all that portion thereof lying south of the fence constructed by defendants as aforesaid including all those portions of said tract now claimed by plaintiff as a part of its right of way, and neither the plaintiff nor its predecessors or grantors have been seized or possessed of said premises, or any part thereof within more than fifteen years before the date of the commencement of this action.

9. That during defendants' occupancy of said lands as herein alleged, they have paid all the general taxes that have been levied thereon during that period, aggregating the sum of $—.

Affirmative Answer.

Said defendants for a further and affirmative answer to the amended complaint allege:—

1. That these defendants are now and have been during all the times herein mentioned husband and wife, living and residing in the county of Spokane, State of Washington.

2. That the cause of action set up in the amended complaint did not accrue within the last ten years immediately preceding the beginning of this action, and the same is therefore barred by the statute of limitations; that these defendants have been in the actual open, notorious and adverse possession of the real estate hereinafter more particularly described, under color and claim of title, and a claim of absolute ownership of said property for more than ten years immediately preceding the commencement of this action; that neither the plaintiff nor its grantors nor predecessors have been seized or possessed of said premises, or any part or parcel thereof, within more than ten years before the date of the commencement of this action.

3. That said premises are described as follows:—Two certain strips of land, each one hundred fifty (150) feet wide, one lying on the south side and the other on the north side of the Northern Pacific Railroad track, and running parallel with the same for the full distance that said tracks run through the southeast quarter of section thirty-two (32) township twenty-six north, or range forty-five

(45) E. W. M. in Spokane county, State of Washington, the north line of one of said strips running parallel with said track and at a uniform distance of fifty feet therefrom, and the south line of
61 the other of said strips running parallel with said track at a uniform distance of fifty feet therefrom.

Affirmative Answer.

Said defendants Goodner, for a further affirmative answer herein allege:—

1. That they are the owners in fee and in possession of the following described real estate mentioned in the complaint, as their community property, and lying within less than two hundred feet of the track of the Northern Pacific Railroad Company, where it passes through the southeast quarter of section thirty-two (32) township twenty-six, north of range forty-five E. W. M., in Spokane county, State of Washington, and more fully described as follows: Two certain strips of land, each one hundred fifty (150) feet wide, one lying on the south side and the other on the north side of the Northern Pacific Railroad track, and running parallel with the same for the full distance that said track runs through the southeast quarter of section thirty-two (32) township twenty-six (26), north of range forty-five (45) E. W. M. in Spokane county, State of Washington, the north line of one of said strips running parallel with said track and at a uniform distance of fifty feet therefrom, and the south line of the other of said strips running parallel with said track at a uniform distance of fifty feet therefrom; that long prior to the beginning of this action the plaintiff and its predecessor The Northern Pacific Railroad Company abandoned all that portion of its right of way as granted by the act of Congress, July 2, 1864, included within said strips, and have never used the same nor made any attempt to use the same, for railroad purposes, nor have they or either of them ever objected to or dissented from defendants' claim of ownership thereof until the commencement of this action.

Wherefore defendant- prays judgment:—

1. That the plaintiff take nothing by this action.

2. That these defendants be adjudged the owner- in feel simple of the said real estate described in the last affirmative defense, free and clear of all encumbrances, or cloud upon the title, and that their title thereto be quieted.

62 3. And for all general relief to which said defendants may be entitled in equity or at law, and for the costs and disbursements of this action.

BLAKE & POST,
Attorneys for Defendants Goodner.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Joseph B. Goodner being duly sworn says that he is one of the defendants in the above entitled action; that he has heard read the foregoing amended answer, knows the contents thereof and believes the same to be true.

JOSEPH B. GOODNER.

Subscribed and sworn to before me this 1st day of December, 1899.

THOMAS B. HIGGINS,
Notary Public, Residing at Spokane, Washington.

Filed Dec. 4 1899 at 3 o'clock p. m.

JAMES A. DRAIN, *Clerk.*
E. G. DRAIN, *Deputy.*

63 STATE OF WASHINGTON, } ss:
County of Spokane, }

In the Superior Court,

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff, *vs.* WILLIAM S. ELY ET AL., Defendants. } No. —. Amended Answer of Defendants J. J. Browne and Anna W. Browne to Amended Complaint.

For amended answer to plaintiff's amended complaint in the above entitled cause the defendants John J. Browne and Anna W. Browne, his wife:

1. Deny each and every allegation contained in paragraph eleven of said amended complaint.

2. Deny each and every allegation contained in paragraph twelve of said amended complaint.

3. Deny each and every allegation, matter and thing contained in paragraph thirteen of said amended complaint, except that they admit the platting of the south half of the northeast quarter, section twenty-four (24) township twenty-five (25) north, range forty-two (42) E. W. M. into Cannon's addition to the city of Spokane Falls, and they admit the platting of the north half of the northeast quarter of section twenty-four (24) township twenty-five (25) north range forty-two (42) E. W. M. into Browne's addition to the city of Spokane Falls; and they admit the platting of the southeast quarter of the southeast quarter of section eighteen (18), township twenty-five (25) north of range forty-three (43) E. W. M. into Havermale's addition to the city of Spokane Falls.

4. Deny each and every allegation contained in paragraph fourteen of said amended complaint.

5. Deny each and every allegation contained in paragraph fifteen of said amended complaint.

6. Deny each and every allegation, matter and thing contained in paragraph sixteen of said amended complaint.

7. Deny each and every allegation contained in paragraph
64 seventeen of said amended complaint.

8. Deny each and every allegation contained in paragraph nineteen of said amended complaint, except that they admit that they refuse to surrender possession of and they are in possession of the following described property, situate in Browne's addition to Spokane Falls (now Spokane), State of Washington, according to the recorded plat thereof, to wit: Lots seven (7), eight (8), nine (9) ten (10) eleven (11) and twelve (12) in block fourteen (14); lots one (1), two (2), and three (3) in block seventeen (17); lots nine (9), ten (10) eleven (11), twelve (12), thirteen (13) and fourteen (14) in block eighteen (18); lots five (5), six (6), seven (7), eight (8), nine (9) and ten (10) in block thirty-two (32); lots one (1), two (2), three (3) four (4) and five (5) in block thirty-three (33); lots six (6) and seven (7) in block thirty-four (34); lots one (1), two (2), and three (3) in block sixteen (16); lots one (1), two (2), three (3) four (4), five (5) and six (6) in block fifteen (15); a fractional part of block thirteen (13) lying south of lots ten (10), eleven (11) and twelve (12) in block thirteen (13); all of block "A."

9. The defendants deny each and every allegation contained in paragraph twenty of said amended complaint, except that the allegation that the defendants claim some right, title, interest or estate in and to certain portions of said real estate, which these defendants admit, which portions of said real estate these defendants have, and claim to have title to, being the property described in the preceding paragraph.

10. These defendants deny each and every allegation contained in paragraph twenty-one of said amended complaint.

II.

For further amended answer and by way of affirmative defense to said amended complaint, these defendants allege that the same cause of action set up in said amended complaint did not accrue within the last ten years immediately preceding the beginning of this action, and the same is barred by the statute of limitations;

that these defendants — been in open, notorious and adverse
65 possession of the entire strip of land described in the amended complaint, except a strip (200) feet in width, marked for railroad purposes upon the plat of Browne's addition to Spokane Falls, of record in said auditor's office, being a strip of land one hundred (100) feet in width on each side of the railroad tracks, as now located and operated, under color and claim of title, and a claim of abso-

lute ownership of said property for more than ten years immediately preceding the commencement of this action; that these defendants have been in the open, notorious and adverse possession of the following described property in Browne's addition to Spokane Falls, according to the plat thereof of record in the office of the auditor of Spokane county, to wit:—A fractional part of block thirteen (13) lying south of lots ten (10), eleven (11) and twelve (12) in block thirteen (13); lots seven (7) eight (8) nine (9), ten (10), eleven (11) and twelve (12) in block fourteen (14); lots one (1), two (2), three (3), four (4), five (5) and six (6) in block fifteen (15); lots one (1), two (2) and three (3) in block sixteen (16); lots one (1) two (2) and three (3) in block seventeen (17); lots nine (9), ten (10) eleven (11), twelve (12), thirteen (13) and fourteen (14) in block eighteen (18); lots five (5) six (6) seven (7), eight (8), nine (9) and ten (10) in block thirty-two (32); lots one (1), two (2), three (3), four (4) and five (5) in block thirty-three (33); lots six (6) and seven (7) in block thirty-four (34); all of block "A"; all in Browne's addition under color and claim of title, and a claim of absolute ownership of the said property for more than ten years immediately preceding the commencement of this action; that neither the plaintiff nor its grantors or predecessors have been seized or possessed of the said lands or premises, or any part thereof, within more than ten years before the commencement of this action.

III.

For further amended answer and by way of affirmative defense and counter claim, these defendants aver and allege:—

1. That these defendants are and were at all the times herein mentioned husband and wife and citizens and inhabitants of the Territory (now State) of Washington, and that the Northern
66 Pacific Railroad Company is and was a corporation formed under a special act of Congress, and that the plaintiff The Northern Pacific Railway Company is a corporation formed under the laws of the State of Wisconsin.

2. That on April 15, 1879, these defendants settled upon, took possession of and made their home upon the north half of the northeast quarter of section twenty-four (24) township twenty-five (25) north of range forty-two (42) E. W. M., in Spokane county, Territory, (now State) of Washington; that said land was at said time unsurveyed and not open for preëmption or homestead entry; that on or about October 7, 1880, the said land was surveyed by the United States Government, and on October 7, 1880, a plat of the same was filed in the land office; that on January 10, 1881, said John J. Brown made preëmption entry thereon, by filing the necessary and proper instrument in the land office in accordance with the United States laws in regard thereto, the said land being public land of the United States, alleging in said declaratory statement settlement thereon on April 5, 1879; that on February 1, 1882, said

John J. Browne made final proof and paid for said land, in accordance with the preëmption laws of the United States and received therefor the receiver's receipt on February 1, 1882, in the usual form; that on June 7, 1883, a patent for said land was issued by the United States Government running to said John J. Browne, and thereafter in the year 1883, delivered to him, which patent granted the said Browne the whole of the north half of the northeast quarter of said section twenty-four (24) without any conditions or reservations or exceptions whatsoever, except the usual reservations as to water and mineral rights that said John J. Browne paid the United States Government for the whole number of acres of land included within the north half of the northeast quarter of said section without any reservations or exceptions whatsoever; that these defendants have been in the open, notorious and adverse possession under color and claim of title and claim of absolute ownership thereof of the entire tract of land described as the north half of the northeast quarter of said section twenty-four (24) from April 15, 1879, and especially from February 1, 1882, up to the present time, except the streets and avenues in Browne's addition after the platting thereof, as hereinafter stated, and except such lots in Browne's addition as, after the platting, they have sold and conveyed to others; that between April 15, 1879, and the date when said John J. Browne or these defendants acquired title to the north half of the northeast quarter of said section from the United States Government, that neither the Northern Pacific Railroad Company nor this plaintiff had located a railroad, or right of way for a railroad, upon or across any part of said land, either by staking the same out in any way upon the land itself, or by filing a map of location thereof showing said railroad or right of way across said premises in any office whatsoever.

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3. That in the year 1883 and prior to July, 1883, and after the issuance of said patent, as aforesaid, these defendants caused the whole of said land to be laid off and platted into town lots and blocks, and streets and alleys, and the same to be surveyed, and the lots and blocks and all of them marked on the ground with stakes and stones and other monuments properly designating the same, and a plat thereof in writing to be made in the manner required by the statutes of the Territory of Washington, showing said lots and blocks and streets and alleys, and the length and width and boundaries thereof, in the manner required by the statutes aforesaid, and called the ground so platted "Browne's addition to Spokane Falls" and these defendants executed a dedication attached and made a part of said plat, dedicating the streets marked and described as public highways, which dedication was signed, sealed and acknowledged in the manner required by law, which plat is dated July 28, 1883, and filed in the office of the auditor of said county on the 30th day of July, 1883, recorded in volume "A" of Plats, at page "15;" that the Northern Pacific Railroad Company aforesaid, at that time, had notice and knowledge of said platting and the filing

thereof; that upon said plat was a street marked "Railroad street," which consisted of a strip of land two hundred (200) feet in width, running in a northeasterly direction across the southeasterly part of said land; that the railroad tracks running over and across said premises as originally constructed, and now used and operated, are in the
68 center of said strip called "Railroad street," that among the streets thus dedicated to the public are Cedar street, Walnut street, Maple street, and Ash street, all of which run north and south and extend across the track of the plaintiff; that among the streets thus dedicated to the public are the streets called Pacific avenue, Second street (now Second avenue) Third street (now Third avenue), all of which run east and west and extend across said railroad tracks; that all of said streets were accepted by the public and accepted by the city of Spokane Falls (now Spokane), a municipal corporation, at the time of the making and filing of said plat in the year 1883, and have ever since been used and occupied as public highways by the public, and maintained as public highways at public expense, and some of them graded at public expense across said railroad tracks and said Railroad street as well as in the other parts thereof; and the said city of Spokane Falls (now Spokane) has been ever since the filing of said plat, and the public have been ever since the filing of said plat, in the open, notorious and adverse possession of said streets throughout the entire length and breadth thereof under color and claim of title and a claim of absolute ownership thereof for public highways without protest or objection on the part of the Northern Pacific Railroad Company or this plaintiff.

That abutting on said Railroad street on the north side thereof and within two hundred feet from the railroad tracks of this plaintiff are lots seven (7), eight (8), nine (9), ten (10), eleven (11) and twelve (12) in block fourteen (14), a fractional part of block thirteen (13) lying south of lots ten (10), eleven (11) and twelve (12) in block thirteen (13); lots one (1), two (2) and three (3) in block seventeen (17); lots nine (9), ten (10), eleven (11), twelve (12) thirteen (13) and fourteen (14) in block eighteen (18); lots five (5) six (6), seven (7), eight (8), nine (9), and ten (10) in block thirty-two (32), and block "A:" all according to the recorded plat of Browne's addition aforesaid; that abutting on said Railroad street on the south side thereof and within two hundred feet from the railroad tracks of the plaintiff are lots one (1), two (2), three (3), four (4), five (5) and six (6) in block fifteen (15); lots one (1), two (2) and three (3) in block
69 sixteen (16); lots six (6) and seven (7) in block thirty-four (34); lots one (1), two (2), three (3), four (4) and five (5) in block thirty-three (33) all according to the recorded plat thereof of Browne's addition.

4. That ever since April 15 1879, and especially ever since the 1st day of February, 1882, these defendants have been in the open, notorious and adverse possession of the lots and blocks described in the preceding paragraph under color and claim of title, and a claim of absolute ownership of the same; that neither the plaintiff nor its

grantors or predecessors have been seized or possessed of said premises or any part thereof for more than ten years before the commencement of this action, and that these defendants have made lasting and valuable improvements upon said premises described in the preceding paragraph more than ten years before the commencement of this action, and since.

5. That prior to the filing of the plat of Browne's addition as hereinbefore alleged, these defendants paid all the taxes assessed thereon for State, county, school district and all other purposes, and that ever since the filing of said plat these defendants have annually paid the State, county and all other taxes assessed upon the lots described in paragraph three hereof, which lots were assessed as the property of these defendants each year, the taxes so paid amounting to several thousand dollars, except that neither the defendant nor any one else has paid the taxes, or any part thereof, since the year 1891; that these defendants have not paid the taxes upon said lots since the year 1891 because of general financial depression and their financial inability to pay such taxes, and for no other reason; that among the taxes assessed against some of said lots and paid by these defendants have been taxes assessed for the cost of grading some of the streets heretofore mentioned as crossing said Railroad street and said railroad tracks, and taxes have been assessed against said lots pursuant to the statutes of the State of Washington, and the ordinances of the city of Spokane.

IV.

That defendants John J. Browne and Anna W. Browne, for
70 a third affirmative answer herein allege:

That they are the owners in fee and in possession of the following described real estate mentioned in the complaint and lying within less than 200 feet of the track of the Northern Pacific Railroad Company where it passes through the north half of the northeast quarter of section twenty-four, township twenty-five north, of range forty-two, E. W. M. Spokane county, State of Washington, more fully described according to numbers of lots and blocks as designated on the plat of Browne's addition to the town of Spokane Falls now on file in the auditor's office of said county, as follows:— Those abutting on said Railroad street on the north side thereof, and within two hundred feet from the railroad tracks of this plaintiff are lots seven (7), eight (8), nine (9), ten (10), eleven (11) and twelve (12) in block fourteen (14), a fractional part of block thirteen (13) lying south of lots ten (10), eleven (11) and twelve (12) in block thirteen (13); lots one (1), two (2) and three (3) in block seventeen (17); lots nine (9), ten (10), eleven (11), twelve (12) thirteen (13) and fourteen (14) in block eighteen (18), lots five (5), six (6), seven (7), eight (8), nine (9) and ten (10), in block thirty-two; and block "A;" all according to the recorded plat of Browne's addition aforesaid; those abutting on said Railroad street on the south side thereof and

within two hundred feet from the railroad tracks of the plaintiff are lots one (1), two (2) three (3) four (4) five (5) and six (6) in block fifteen (15); lots one (1) two (2) and three (3) in block sixteen (16); lots six (6) and seven (7) in block thirty-four (34); lots one (1), two (2), three (3), four (4) and five (5) in block thirty-three (33), all according to the recorded plat thereof of Browne's addition.

That long prior to the beginning of this action the plaintiff and its predecessor, the Northern Pacific Railroad Company, abandoned all that portion of its right of way as granted by the act of Congress July 2nd, 1864, included within the lots aforesaid, and have never used the same or made any attempt to use the same for railroad purposes, nor have they, nor either of them, ever objected to or dissented from defendants' claim of ownership thereof until the
71 commencement of this action.

Wherefore, these defendants pray judgment:

1. That plaintiff take nothing herein.

2. That these defendants be adjudged the owners in fee simple of the following described property to wit—a fractional part of block thirteen (13), lying south of lots ten (10), eleven (11), and twelve (12) in block thirteen (13); lots seven (7), eight (8) nine (9), ten (10), eleven (11) and twelve (12) in block fourteen (14) lots one (1), two (2) three (3), four (4) and five (5) and six (6) in block fifteen (15); lots one (1) two (2) and three (3) in block sixteen (16); lots one (1) two (2) and three (3) in block seventeen (17); lots nine (9), ten (10), eleven (11), twelve (12) thirteen (13) and fourteen (14) in block eighteen (18); lots five (5) six (6), seven (7), eight (8) nine (9) and ten (10) in block thirty-two (32); lots one (1), two (2), three (3), four (4) and five (5) in block thirty-three (33); lots six (6) and seven (7) in block thirty-four (34); all of block "A" of Browne's addition to Spokane Falls according to the recorded plat thereof of record in the office of the auditor of Spokane county, Washington, free and clear of all encumbrances or cloud upon the title, and that their title thereto be quieted, and that they be adjudged to have the right of possession of said lots and parcels of ground as against the plaintiff.

3. For all general relief to which the said defendants may be entitled in equity or at all and for the costs and disbursements of this action.

BLAKE & POST,
Attorneys for Defendant Browne.

STATE OF WASHINGTON, } ss:
County of Spokane, }

John J. Browne, being first duly sworn says he is one of the defendants in the above entitled action; that he has read the foregoing amended answer knows the contents thereof and believes the same to be true.

JOHN J. BROWNE.

Subscribed and sworn to before me this 4th day of December, 1899.

THOMAS B. HIGGINS,
Notary Public, Residing at Spokane, Washington.

Filed Dec. 5 1899 at 9:30 o'clock a. m.
JAMES A. DRAIN, *Clerk.*

72 In the Superior Court of the State of Washington in and for Spokane County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
WILLIAM S. ELY ET AL., Defendants.

Comes now the defendant Anton Hahn in the above entitled action and for his separate and amended answer herein, leave of the court being first obtained,

1. He denies each and every allegation contained in paragraphs 14, 15, 16, 17 and 21 of plaintiff's amended complaint.

2. He admits that he is in possession of certain portions of the north half of the northeast quarter and the north half of the northwest quarter of section thirty-four (34) township twenty-six (26) north of range forty-five (45) E. W. M. in Spokane county State of Washington, which lie within two hundred feet of the main track of the Northern Pacific Railroad Company, where the same passes adjacent to and through said tract of land in the county of Spokane, Washington, but he denies that said possession is unlawful or wrongful in any wise.

3. He admits that he claims some right, title, interest or estate in and about certain portions of said lands above described embraced with- a tract two hundred feet on either side of said main tract above mentioned and denies each and every other allegation contained in paragraph 20 of plaintiff's amended complaint.

Affirmative Answer.

For a further and affirmative amended answer to said amended complaint, this defendant alleges:—

1. This defendant is and has at all times herein mentioned been a resident of Spokane county, Washington, living upon the premises hereinafter described.

2. That at all times during the year 1879 and subsequent thereto until the issuance of patent to this defendant, the following lands, situate in the Territory (now State) of Washington was public land of the United States, subject to entry under the homestead
73 and pre-emption laws of the United States Government, namely: The north half of the northeast quarter and the

north half of the northwest quarter of section thirty-four (34) in township twenty-six (26) north of range forty-five (45) E. W. M. in Spokane county, State of Washington. That in the early fall of 1879 one Goetner, being then a citizen of the United States and duly qualified to make entry of said lands under the homestead laws, settled upon the above described lands, which were then unsurveyed, and erected valuable and permanent improvements on the same of the value of about four hundred dollars. That said Goetner continued in possession and actual occupation thereof until about the 12th day of April, 1880, and that on said date said Goetner, for a valuable consideration sold his improvements thereon, together with his right of possession thereto, to this defendant, and thereupon this defendant in pursuance of said purchase immediately took full and absolute possession of said lands and has held said possession continuously up to the present time and is still in possession thereof.

3. That in the summer of 1880 said township twenty-six was surveyed under and by the direction of the United States Government and in the latter part of said year became subject to entry under the homestead laws of the United States. That thereafter on or about the — day of ——, 1881, this defendant, then being a citizen of the United States, and in every way qualified to make entry of said lands under the homestead laws, entered the same as a homestead under said laws and filed his application thereto in the proper land office at Spokane Falls (now Spokane) Washington Territory, (now State of Washington) and after the necessary proceedings to quiet title thereto, on or about the 26th day of November, 1886, this defendant made his final proof of settlement and occupation of said lands and other requisites necessary to entitle him to patent under said homestead laws, and having paid the necessary and proper fee, received a final receipt from the receiver of said land office therefor, and, afterwards on towit: the 26th day of May, 1888, patent was issued by the United States Government to this defendant for said lands under said homestead entry.

74 4. That this defendant about the — 1880 constructed a fence upon said lands parallel with the main track of said Northern Pacific Railroad Company about one hundred feet from said track which track has never been changed since then but continues to this day to be in the same position as at the time said fence was so constructed and that this defendant has maintained said fences ever since said time, the same being a substantial fence, until on or about the year 1897, when a new fence was constructed on the north side of said track upon said lands, as this defendant believes and alleges by said railroad company parallel with said track about seventy-five feet from the same.

5. That during all the time subsequent to 1880, this defendant occupied, had possession of, farmed and cultivated all of said land lying north of said fences constructed by him in said year 1880, and subsequently maintained by him, including a portion of the land

claimed by plaintiff herein as part of its right of way, namely a tract about one hundred feet in length.

6. That from the year 1880 up to the year 1897, this defendant held full and undisturbed possession of, occupied and cultivated all of that part of ground claimed by plaintiff as its right of way upon the above described lands lying south of said main track hereinbefore referred to of the Northern Pacific Railroad Company and that during all of said time said possession and right of said defendant has been undisturbed by any one.

7. That on or about the year 1897 a fence was constructed by the plaintiff herein, as this defendant alleges, upon said described lands parallel with the main track of said Northern Pacific Railroad Company on the south side thereof about seventy-five feet distance from said track.

8. That for the period of more than sixteen years past before the commencement of this action, said defendant under claim and color of title and a claim of absolute ownership has been in the actual, open and notorious possession of all that portion of said described lands, lying north of the fence constructed on the north side of said main track by the plaintiff, herein, and that portion lying south of
75 the line of the fence constructed by the defendant about the year 1880, including all parts of said land now claimed by plaintiff as part of its right of way. That the plaintiff has not been nor has its predecessors, or grantors, been seized or possessed of said premises or any part of the same within more than sixteen years before the date of the commencement of this action.

9. That during the defendant's possession of said lands he has paid all the general taxes that have been levied thereon.

Affirmative Answer.

This defendant for a further and affirmative amended answer to the plaintiff's amended complaint, alleges:—

1. That this defendant now is and at all times herein has been a resident of Spokane county, State of Washington.

2. That the cause of action set up in plaintiff's amended complaint did not accrue within the last ten years immediately preceding the commencement of this action, and that the same is barred by the statute of limitations. This defendant has been in actual, open and adverse possession of the real estate hereinbelow more particularly described under color and claim of title and a claim of absolute ownership of said property for more than ten years immediately preceding the commencement of this action. That neither the plaintiff, nor its predecessors, or grantors, have been seized or possessed of said premises or any part or parcel thereof within more than ten years before the date of the commencement of this action.

3. The premises described are as follows to wit:—All of that portion of the land claimed by plaintiff as right of way situate in the

north half of the northeast quarter and the north half of the northwest quarter of section thirty-four, township twenty-six, north of range forty-five E. W. M. in Spokane county, Washington, lying on the north side of the Northern Pacific Railroad track where the same runs through said lands in an easterly westerly direction north of a line running north of said track, and parallel therewith at a uniform distance of seventy-five feet from the center of said
76 track, being a track of about one hundred and twenty-five feet in width, and all of that portion of the land lying south of said track south of a line running parallel with said track on the south side thereof at a uniform distance of seventy-five — from the center of said tract, being a strip of about one hundred twenty-five feet in width.

Affirmative Answer.

For a further and affirmative answer to plaintiff's amended complaint this defendant alleges:—

1. That long prior to this suit this defendant was and is now the owner in fee and in possession of the following described real estate, described in plaintiff's amended complaint and lying within less than two hundred feet of the track of the Northern Pacific Railroad Company, where it passes through the north half of the northeast quarter and the north half of the northwest quarter of section thirty-four, township twenty-six north of range forty-five E. W. M., in Spokane county, Washington, and more fully described as follows, to wit:—Two strips of land, each one hundred twenty-five feet wide, one lying on the north side of, and the other lying on the south side of said Northern Pacific track, running parallel with said track for the full distance that said track runs through said tract of land. That the south line of one of said strips of land runs parallel with said track and at a uniform distance of seventy-five feet therefrom, and the north line of the other of said strips of land runs parallel with said track at a uniform distance of seventy-five feet therefrom. That long prior to the commencement of this action plaintiff and his predecessor, the Northern Pacific Railroad Company, abandoned all that portion of its right of way as granted by the act of Congress on or about July 2nd, 1864, included within said two strips of land herein before described and have never used the same, or made any attempt to use the same for railroad purposes or any other purpose whatsoever, nor have they or either of them ever objected to or dissented from defendant's claim of ownership thereto until the commencement of this action.

Wherefore this defendant prays for a decree of this court that the plaintiff recover nothing and that this defendant be adjudged
77 the owner in fee simple of said lands described in paragraph 3 of defendant's last affirmative defense, free from all and any cloud upon said title or encumbrance whatsoever as against plaintiff and that his title thereto be quieted and for such other and fur-

ther relief as the court may deem just and for his costs and disbur se ments herein.

JOHN B. HESS &
SCOTT & ROSSLOW,
Attorneys for Defendant Anton Hahn.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Anton Hahn being first duly sworn on oath deposes and says:—That he is one of the defendants named in the foregoing entitled action; that he has read his foregoing amended answer; knows the contents thereof and that the same is true.

ANTON HAHN.

Subscribed and sworn to before me this 4th day of December, A. D. 1899.

WM. D. SCOTT,
Notary Public, in and for the State of Washington,
Residing at Spokane, Washington.

Received copy of above amended answer this 5th day of December, A. D. 1899.

STEPHENS & BUNN,
Attorneys for Plaintiff.

Filed Dec. 5 1899 at 10:25 o'clock a. m.

JAMES A. DRAIN, *Clerk.*
E. G. DRAIN, *Deputy.*

78 In the Superior Court of the State of Washington in and for the County of Spokane.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff, }
v. } No. 13258.
WILLIAM S. ELY ET AL., Defendants. }

Come now defendants Covert August and Pauline E. August impleaded in the above entitled action and for amended answer jointly deny,

First. That they have any knowledge or information sufficient to form a belief as to the allegations, matters and things alleged in paragraphs I. 4. 5. 6. 7. 8. 9. 10 and 18 of plaintiff's amended complaint and therefore deny the same.

Second. Deny each and every allegation, matter and thing contained in paragraphs 11. 14. 15. 16. 17 and 19 of said amended complaint.

Third. Answering the allegations, matters and things contained in the 13th paragraph defendants deny that the said Northern Pacific Railroad Company constructed said line of railroad and telegraph upon the lines indicated and fixed by the said plats of definite location over and across the said property. Deny that the said line of said railroad as constructed and operated across the said lands was and is coterminous with the line of said railroad as fixed and designated in said plats of definite location.

Fourth. Answering the allegations, matters and things contained in the 20th paragraph of plaintiff's amended complaint, deny each and every allegation, matter and thing contained therein except that defendants and each of them claim some right, title and interest in and to the said described right of way adverse to the pretended interests and pretended title of plaintiff.

Defendants further answering allege that neither the plaintiff, its predecessor or predecessors, grantor or grantors, has been seized or possessed of the premises in question within ten years next preceding the commencement of this action, and that plaintiff's said
79 cause did not accrue within ten years next preceding the commencement of this action; that defendants and each of them have been for more than ten years next preceding the commencement of this action, and are now, in the actual, open, adverse, notorious, peaceable, continuous and undisputed possession of the said premises under claim and color of right and record title and absolute ownership.

The said premises are those referred to in paragraph 13 of plaintiff's amended complaint as sections twenty-eight in township twenty-three north of range forty-one, east of Willamette meridian, or more particularly described as S. ½ of S. W. ¼ of S. E. ¼ of said section, tp. and range.

Defendants Corbett for second and further affirmative defense allege that for more than ten years next preceding the commencement of this action, defendants have been in the actual, open and notorious possession of the premises in question under claim and color of title from the United States of America, and for more than ten successive years defendants have paid all taxes of whatsoever kind and nature assessed against said premises.

What said premises are those referred to in paragraph 13 of plaintiff's amended complaint as sections twenty-eight in township twenty-three north of range forty-one, east of the Willamette meridian, or more particularly described as the north half of the S. W. ¼ and the S. W. ¼ of S. E. ¼ of said section.

Defendants further answering, alleges for a third and further affirmative defense that on or about the 5th day of October 1887, defendant Corbett, Oregon, being then and there a citizen of the United States and in every way a qualified pre-emptor of the public lands of the United States, took up, settled upon and began to make improvements for a home on the premises in question and thereafter in due course, on the 10th day of January, 1878, made the proper

entries of settlement in the proper land office and thereafter on the 8th day of March, 1880, made his final proofs and payments in the proper land office, and thereafter on the 30th day of June, 1881, a patent was issued to said defendant by the said United States
80 Government conveying to defendant the premises herein described by patent without reservations.

2nd. That after the said defendant had made his final proofs on said land, and had made his final payments therefor, and was entitled to have issued to him a patent, but not before said time, the Northern Pacific Railroad Company began to survey across the lands of defendant for the purpose of laying out a right of way for the said road, but this defendant forbade the said company, its agents and employees from proceeding with said survey and ordered said railroad, its officers, agents and employees to desist from trespassing upon the lands of this defendant, and to proceed with said survey and the laying out of said right of way across the lands of defendant, but that notwithstanding said protest, said railroad company proceeded to survey the site for its said right of way and build thereon its said road contrary to the will of defendant.

3rd. That thereafter on or about the — day of ——, 1883, this defendant built parallel with said railroad where the same passes through the premises in question, at a distance of fifty feet on either side of the center of said railroad a substantial fence separating the other lands of defendants from that so wrested from defendants by said railroad, which fence defendant has maintained since said time and has rebuilt the same from time to time, when the same was destroyed by fire.

4th. That since so fencing off said land and for more than ten years next preceding the commencement of this action defendants have been in the exclusive possession and control of the lands so fenced off by defendants, and have made lasting and valuable improvements in the same; that said defendants have tilled said land and put it into agricultural purposes; that defendants have paid the taxes during said time on said lands; have mortgaged the same and placed on record said mortgage; that all of said acts were well known to the Northern Pacific Railroad Company and to this plaintiff; said defendant has been permitted without objection by plaintiff or its predecessor to exercise said acts of ownership over the said lands and prior to the commencement of this suit said plain-
81 tiff and its predecessors abandoned said land except said strip of 100 feet so fenced off and used in the operation of said road, and defendants have during all of said time claimed to own in fee simple the said lands so fenced off as aforesaid, free from any claim or pretended claim of plaintiff or its predecessor.

The premises in question are those referred to in plaintiff's amended complaint in paragraph 13 as section twenty-eight in township twenty-three, north of range forty-one east of the Willamette meridian and more particularly described as the north ½ of the

northwest quarter and the northwest ¼ of the N. E. ¼ of said section, tp. & range.

Wherefore defendants pray that plaintiff take nothing by its said action; that defendants be adjudged to be the owners in fee simple of all of said afore described premises except the 100 feet so used by plaintiff; that defendants' said title be forever quieted and for such other relief to which defendants may be entitled together with the costs and disbursements herein.

J. E. BRONOUGH,
Attorney for Defendants August.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Covert August being duly sworn says that he is one of the defendants mentioned in the foregoing answer; that he has read said amended answer, knows the contents thereof and that the same is true.

COVERT AUGUST.

Subscribed and sworn to before me this 6 day of December, 1899.

J. E. BRONAUGH,
Notary Public Residing at Spokane.

Copy of within received this 6 day of December, 1899.

STEPHENS & BUNN,
Attorney- for Plaintiff.

Filed Dec. 7 1899 at 11:15 o'clock a. m.
JAMES A. DRAIN, *Clerk.*
R. A. KOONTZ, *Deputy.*

82 In the Superior Court of the State of Washington for Spokane County.

NORTHERN PACIFIC RAILWAY CO., Plaintiff,
vs.
WILLIAM S. ELY, MARVIN ARNOLD, JULIA Arnold, Michael Blessing, Mary Blessing, and Gustave Reith *et al.*, Defendants. } Amended Answer.

Come now the above named defendants Marvin Arnold, Julia Arnold and Gustave Reith and for amended answer to the amended complaint of plaintiff herein, leave of court having been granted, allege:

1st. That they and each of them have no knowledge or information sufficient to form a belief as to each and every of the allegations in paragraphs 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18 of said complaint, and each of said paragraphs.

2nd. They and each of them deny each and every allegation in paragraphs 19, 20 and 21 and in each of said paragraphs.

And for an affirmative answer to said complaint, said defendants allege that these defendants and their grantors and lessors are now and have been in actual, open, notorious and exclusive possession of the following land in said county and State, to-wit:—lots 8 and 9 in block 1 in Saunders' addition to Spokane City, for more than ten years before this suit was begun to wit, continuously since about the 30th day of April, 1877, under color and claim of title made in good faith, and have paid all taxes legally assessed on said lands.

For a second affirmative answer to said complaint defendants allege that plaintiff or its grantors or predecessors have not been seized or possessed of said premises or any part thereof within 10 years before the commencement of this action.

For a third affirmative answer to said complaint defend-
83 ants allege that the cause of action set forth in plaintiff's complaint herein, did not accrue against these defendants or either of them within 10 years before the commencement of this action.

For a fifth affirmative answer to said complaint defendants allege that there is a misjoinder of parties defendant, in that the several defendants have possession of and claim title to separate and distinct legal subdivisions of land, and claim the same separately and not jointly as alleged in said complaint.

For a sixth affirmative answer defendants Marvin Arnold and Julia Arnold allege that they have no interests or title in said property, but hold the same as tenants of their co-defendant Gustave Reith.

For a seventh affirmative answer to said complaint, defendants allege that said lots 8 and 9 of block 1 in Saunders' addition is a sub-division of the N. ½ of the S. W. ¼ and the W. ½ of the N. W. ¼ of section 20, tp. 25 north of range 43, E. W. M.

For an eighth affirmative answer to said complaint, defendants allege that on or before the third day of October 1877, one H. T. Cowley entered and settled upon the said N. ½ of the S. W. ¼ and W. ½ of the N. W. ¼ of section 20, tp. 25, north of range 43, E. W. M. as a homestead, and on or about the third day of October, 1883, said Cowley made final proof of his settlement and received from the United States land office for the district of Spokane Falls (now Spokane) his certificate of final proof, and on which said day he made his final payment for the same; and on or about the 30th day of December, 1884, the Government of the United States issued to said H. T. Cowley its patent for the aforesaid part of said section 20.

For a ninth affirmative answer to plaintiff's complaint, these defendants allege that on or about the 15th day of March, 1883, the said H. T. Cowley, conveyed the N. W. ¼ of the N. W. ¼, and the N. ½ of the S. W. ¼ of said section 20, tp. 25, north of range 43, E. W. M. to one F. R. Moore, and the said F. R. Moore on or about

the 20th day of July, 1883, entered into the possession of and platted said land into lots and blocks and streets and alleys
84 and on or about said day filed his plat with the dedication of the streets and alleys therein, to the public, in the auditor's office of Spokane county, designating the same as Saunders' addition to Spokane Falls (now Spokane), and among the lots and blocks so platted are the said lots 8 and 9 of block 1.

That the said H. T. Cowley and the said F. R. Moore and their grantors have been in open, notorious and adverse possession of all of said above described land since said date under color of title and claim of absolute ownership thereof, up to the present time, except the streets and avenues and alleys thereof.

That between the said entry thereof of H. T. Cowley in 1877 as aforesaid, and the date when the said F. R. Moore acquired title thereof and platted the same, neither the Northern Pacific Railroad Co. nor this plaintiff had located a railroad or right of way for a railroad upon or across any part of said land, either by staking the same out in any way upon the land itself, or by filing a map of location thereof showing said railroad or right of way across said premises in any office whatsoever.

2. That the Northern Pacific Railroad Company aforesaid at the time of the platting and dedication of said land as aforesaid, and the entry thereon and the occupancy thereof by defendants and their grantors, had notice and knowledge of said platting and the filing thereof, and have ever since until the commencement of this suit, acquiesced in and permitted the use and improvement of said lands.

3. That all of said streets, avenues and alleys in said Saunders' addition were accepted by the public and accepted by the city of Spokane Falls (now Spokane) a municipal corporation, at the time of making and filing of said plat, in the year 1883, and have ever since been used and occupied as public highways for the public and have been maintained as public highways at public expense, and some of them, to wit, Sprague avenue, upon which said lots 8 and 9 front, graded at public expense, extending across said railroad tracks, and the said city of Spokane Falls has been ever since the filing of said plat, and the public has been ever since the filing
85 of said plat in the open, notorious and adverse possession of said streets throughout the entire length and breadth thereof under color and claim of title, and a claim of absolute ownership thereof for public highways, and these defendants and their grantors have been in the actual, open and notorious possession and occupancy of said lots 8 and 9 in block 1 in said Saunders' addition, since the filing of said plat, to wit: in the year 1883 with the knowledge of plaintiff and its predecessors the Northern Pacific Railroad Company, without protest or objection on the part of said railroad company, or this plaintiff.

4. That by reason of the premises aforesaid, the plaintiff and its predecessor, the Northern Pacific Railroad Company, long before the beginning of this action, abandoned all that portion of its right

of way on both sides of its track embraced within said Saunders' addition, so laid off and platted as aforesaid, being more particularly described as lots and blocks in said addition; that both the plaintiff and the said Northern Pacific Railroad Company have had full knowledge of all the facts and interests herein alleged, ever since the occurrences thereof, and neither of them has ever used or attempted to use any of the property in the controversy for railroad purposes, nor objected, nor dissented from defendants' claim of ownership thereof, until the commencement of this action.

Wherefore these defendants pray that plaintiff take nothing by its action, and that they go hence without a day and have judgment against plaintiff for their costs and disbursements in this behalf expended and incurred.

JAMES DAWSON,
Attorneys for Defendants.

STATE OF WASHINGTON, }
County of Spokane, } *ss:*

Before the subscriber personally appeared Gustave Reith who being by me first duly sworn, on oath deposes and says: That I am one of the defendants named in the above entitled action; that I have read the foregoing amended answer, and that the matters and things therein contained are true as he verily believes.

GUSTAVE REITH.

Subscribed and sworn to before me this 5" day of Dec. 1899.

M. M. RICHARDSON,
Notary Public for Washington, Residing at Spokane.

Filed Dec. 9, 1899 at 10·25 o'clock a. m.

JAMES A. DRAIN, *Clerk.*
R. A. KOONTZ, *Deputy.*"

86 In the Superior Court of the State of Washington in and for Spokane County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff, }
vs.
WILLIAM S. ELY ET AL., Defendants. }

Come now the defendants Z. Colby and Sophia Colby in the above entitled action and for their separate and amended answer herein, leave of court being first obtained,

1. Deny each and every allegation contained in paragraphs 14, 15, 16, 17 and 21 of plaintiff's amended complaint.

2. They admit that they are in possession of certain portion of the northwest quarter of section fourteen (14), township twenty-five (25),

north of range forty-three (43) E. W. M. in Spokane county, State of Washington, which lie within two hundred feet of the main track of the Northern Pacific Railroad Company, where the same passes adjacent to and through said tract of land in the county of Spokane, Washington, but they deny that said possession is unlawful or wrongful in any wise.

3. They admit that they claim some right, title, interest or estate in and about certain portions of said lands above described embraced with- a tract two hundred feet on either side of said main track above mentioned, and deny each and every other allegation contained in paragraph 20 of plaintiff's amended complaint.

Affirmative Answer.

For a further and affirmative answer to said amended complaint these defendants allege:—

1. That said defendants Z. Colby and Sophia Colby now are and at all times herein mentioned have been residents of Spokane county, State of Washington.

2. That the cause of action set up in plaintiff's amended complaint did not arise within ten years from the date of the commencement of this action and that the same is barred by the statute of limitations under the laws of the State of Washington.

87 3. That these defendants on or about the — day of March, 1883, entered on said premises hereinafter described took possession thereof under the pre-emption laws of the United States of America and that subsequently during the year 1886, said defendants changed it to a homestead under the homestead laws of the United States and made final proof thereunder, and that on the 15th day of November in the year 1892, a patent was duly issued to said defendant Zacheus Colby by the Government of the United States. That ever since said — day of March 1883, said defendants have been in actual, notorious open and conspicuous possession of said premises adverse to this plaintiff and any other person or persons and that said premises held and owned by these defendants and mentioned in plaintiff's amended complaint are known and described as the northwest quarter (N. W. ¼) of section fourteen (14) in township twenty-five (25) north of range forty-three (43) E. W. M. in Spokane county, State of Washington. That said defendants at the time they took possession of said premises and ever since said time have kept said premises fenced with a substantial enclosure, excepting a strip thereof of one hundred and sixty (160) feet on the north side from the center of the track of the railroad of the Northern Pacific Railroad Company, a corporation, and running in a northeasterly direction along said track through said premises.

4. Defendants further allege that during all of said time they have paid all the county and State taxes which were levied against said premises and every part thereof.

Affirmative Answer.

For further and affirmative answer to plaintiff's amended complaint these defendants allege:—

1. That long prior to this suit these defendants were and are now the owners in fee and in possession of the following described real estate described in plaintiff's amended complaint, and lying within less than two hundred (200) feet of the track of the Northern Pacific Railroad Company where it passes through the northwest quarter (N. W. ¼) of section fourteen (14) in township twenty-five (25) north of range forty-three (43) E. W. M. in Spokane county, State of Washington, and more fully described as follows:— a certain strip of land about forty feet in width lying on the north side of said Northern Pacific Railroad Company's track running parallel with said track for the full distance that said track runs through the land above described, the south line of said strip of land running parallel with said track and at a uniform distance of about one hundred (160) feet therefrom.

88

That long prior to the commencement of this action plaintiff and its predecessors the Northern Pacific Railroad Company abandoned all that portion of its right of way as granted by the act of Congress on or about July 2nd, 1864 included within said strip of land heretofore described and have never used the same, nor made any attempt to use the same for railroad purposes, or any other purpose whatsoever, nor have them or either of them ever objected to or dissented from defendants' claim of ownership thereto, prior to the commencement of this action.

Wherefore these defendants pray for a decree of this court that the plaintiff recover nothing and that these defendants be adjudged the owner in fee simple of said lands described in paragraph 3 of defendants' first affirmative defense, free from all and every cloud upon said title or encumbrance whatsoever as against plaintiff and that their title thereto be quieted and for such other and further relief as the court may deem just and for their costs and disbursements herein.

SCOTT & ROSSLOW,
JOHN B. HESS,
Attorneys for said Defendants.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Sophia Colby being first duly sworn, on oath deposes and says: That she is one of the defendants name- in the foregoing entitled action; that she has read her foregoing amended answer, knows the contents thereof and that the same is true.

SOPHIA COLBY.

Subscribed and sworn to before me this 8th day of December, A. D. 1899.

JOHN B. HESS,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

Filed Dec. 9 1899 at 2:55 o'clock p. m.

JAMES A. DRAIN, *Clerk.*
R. A. KOONTZ, *Deputy.*

89 In the Superior Court of the State of Washington for Spokane County.

NORTHERN PACIFIC RAILWAY Company, Plaintiff,
vs.
WILLIAM S. ELY ET AL., Defendants.
} Reply to Answer of Defendant William S. Ely.

Now comes the plaintiff above named, and for reply to the answer of defendant William S. Ely served and filed herein,

1. Denies each and every allegation, matter and thing contained in the affirmative matter and defenses pleaded in said answer.

2. Denies each and every allegation, matter and thing contained in what is designated as "further answer and affirmative defense," pleaded in said answer, which is the first affirmative matter, or defense, pleaded in said answer.

3. Denies each and every allegation, matter and thing contained in what is designated as "further answer, and by way of a second affirmative defense," pleaded in said answer which is the second affirmative matter, or defense, pleaded in said answer.

4. Denies each and every allegation, matter and thing contained in what is designated as "further answer and by way of a third affirmative defense," pleaded in said answer, which is the third affirmative matter, or defense, pleaded in said answer.

5. Denies each and every allegation, matter and thing contained in what is designated as "further answer and by way of fourth affirmative defense and counter claim," pleaded in said answer, which is the fourth affirmative matter, or defense, pleaded in said answer.

Wherefore plaintiff prays for judgment and decree as demanded in its amended complaint herein.

STEPHENS & BUNN,
Attorneys for Plaintiff.

90 STATE OF WASHINGTON, } ss:
County of Spokane, }

Jno. W. Hill, being first duly sworn, upon oath deposes and says - That he is the general agent of The Northern Pacific Railway Com:

pany, a corporation, the plaintiff above named, located and residing at Spokane, in Spokane county, State of Washington, and makes this affidavit of verification for and on behalf of said plaintiff; that he has read the foregoing reply and knows the contents thereof, and that the same is true as he verily believes.

JNO. W. HILL.

Subscribed and sworn to before me this 28th day of October, 1899.

E. T. WHITE,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

Due service of the within reply by receipt of a true copy thereof admitted this 28th day of October, 1899.

STERN, HAMBLEN & LUND,
Attorney- for Def't Wm. S. Ely.

Filed Oct. 30 1899 at 9 o'clock a. m.

JAMES A. DRAIN, *Clerk.*
FRED W. LUELLING, *Deputy.*

91 In the Superior Court of the State of Washington for the County of Spokane.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff, *v.* WILLIAM S. ELY, Defendants. } No. 13258. Reply to Answer of James McKenzie.

Comes now the plaintiff and for reply to the answer of the defendant James McKenzie, denies each and every allegation, matter and thing contained in the affirmative matter and defense set forth or pleaded in said answer.

STEPHENS & BUNN,
Attorneys for Plaintiff.

STATE OF WASHINGTON, *County of Spokane,* } ss:

Jno. W. Hill, being first duly sworn on oath deposes and says: That he is an officer of the above named plaintiff Northern Pacific Railway Company, to wit:—its general agent at and in the city and county of Spokane, Washington, and he makes this affidavit on behalf of said company; that he has read the above and foregoing reply, knows the contents thereof, and the same is true as he verily believes.

JNO. W. HILL.

Subscribed and sworn to before me this 23rd day of February, A. D. 1899.

[NOTARIAL SEAL.] E. T. WHITE,
Notary Public in and for the State of Washington,
Residing at Spokane.

Due service of within reply by receipt of a true copy thereof admitted this 24th day of February, 1899.

BLAKE & POST,
Attorney- for Plft. James McKenzie.

Filed Feb. 25 1899 at 11:10 o'clock a. m.

JAMES A. DRAIN, *Clerk.*
—— ——, *Deputy.*

92 In the Superior Court of the State of Washington for Spokane County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff, *vs.* WILLIAM S. ELY ET AL., Defendants. } Reply to Answer of Defendants Marvin Arnold *et al.*

Comes now the plaintiff above named and for reply to the answer of defendants Marvin Arnold, Julia Arnold, Michael Blessing, Mary Blessing and Gustave Reith :—

1. Denies each and every allegation, matter and thing contained in what is designated as "affirmative answer," pleaded in the answer of said defendants, which is the first affirmative matter or defense, pleaded in said answer.

2. Denies each and every allegation, matter and thing contained in what is designated as "second affirmative answer," pleaded in said answer, which is the second affirmative answer, or defense, pleaded in the answer of said defendants.

3. Denies each and every allegation, matter and thing contained in what is designated as "third affirmative answer," pleaded in the answer of said defendants, which is the third affirmative defense or answer, pleaded in said answer of said defendants.

4. Denies each and every allegation, matter and thing contained in what is designated as "fourth affirmative answer," pleaded therein, which is the fourth affirmative defense, or answer, pleaded in said answer of said defendants.

Wherefore plaintiff prays judgment as heretofore prayed.

STEPHENS & BUNN,
Attorneys for Plaintiff.

93 STATE OF WASHINGTON, } ss:
County of Spokane, }

Jno. W. Hill, being first duly sworn upon oath deposes and says that he is an officer of The Northern Pacific Railway Company, a corporation, the plaintiff in the above entitled action, to wit—its general agent, located at and residing in the city of Spokane, Spokane county, State of Washington, and makes this verification for and on behalf of said plaintiff; that he has read the above and foregoing reply and knows the contents thereof; and that the same is true as he verily believes.

JNO. W. HILL.

Subscribed and sworn to before me this 22nd day of March, 1899.

E. T. WHITE,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

Due service of within reply by receipt of a true copy thereof admitted this 22 day of March, 1899.

HYDE & DAWSON,
Attorney- for Arnold et al.

Filed Mar. 22 1899 at 12:45 o'clock p. m.

JAMES A. DRAIN, *Clerk.*
R. A. KOONTZ, *Deputy.*

94 In the Superior Court of the State of Washington for Spokane County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff, *vs.* WILLIAM S. ELY ET AL., Defendants. } Reply to Answer of Defendants Germond and Loertcher.

Comes now the plaintiff above named, and for reply to answer of defendants Eugene Germond, Claudie A. Germond and Jacob Loechter:—

1. Denies each and every allegation, matter and thing contained in the affirmative matter and defenses pleaded in said answer.

2. Denies each and every allegation, matter and thing contained in what is designated as "further and affirmative defense," pleaded in said answer, which is the first affirmative matter, or defense, pleaded in said answer.

3. Denies each and every allegation, matter and thing contained in what is designated as "further and second affirmative defense"

pleaded in said answer, which is the second affirmative matter, or defense, pleaded in said answer.

4. Denies each and every allegation, matter and thing contained in what is designated as "further answer and counter claim," pleaded in said answer, which is the first affirmative matter, or defense, pleaded in said answer.

Wherefore plaintiff prays judgment as heretofore prayed.

STEPHENS & BUNN,
Attorneys for Plaintiff.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Jno. W. Hill, being first duly sworn on oath deposes and says: That he is the general agent of The Northern Pacific Railway Company, a corporation, plaintiff in the above entitled action, located and residing at Spokane, in Spokane county, Washington, and
95 makes this verification for and on its behalf; that he has read the above and foregoing reply and knows the contents thereof; and that the same is true as he verily believes.

JNO. W. HILL.

Subscribed and sworn to before me this 24th day of May, 1899.

E. T. WHITE,
Notary Public for the State of Washington,
Residing at Spokane, Washington.

Due service of within reply by receipt of a true copy thereof admitted this 24th day of May, 1899.

HENLEY, KELLAM & LINDSLEY,
Attorney- for Def'ts Germond & Loechter.

Filed May 24 1899 at 1 o'clock p. m.
JAMES A. DRAIN, *Clerk.*
E. G. DRAIN, *Deputy.*

In the Superior Court of the State of Washington for Spokane County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff, *vs.* WILLIAM S. ELY ET AL., Defendants.	Reply to Amended Answer of Defendants Joseph B. Goodner and Sallie Goodner.

Comes now the plaintiff above named and for reply to the amended answer of defendants Joseph B. Goodner and Sallie Goodner,

1. Denies each and every allegation, matter and thing contained in the affirmative matter and defenses pleaded in said amended answer.

[redacted]

2. Denies each and every allegation, matter and thing contained in what is designated as "further and affirmative answer" pleaded in said amended answer, which is the first affirmative matter or defense pleaded in said amended answer.

3. Denies each and every allegation, matter and thing contained in what is designated as "further and affirmative answer" pleaded in said amended answer, which is the second affirmative matter or defense pleaded in said amended answer.

4. Denies each and every allegation, matter and thing contained in said amended answer, which is the third affirmative matter or defense pleaded in said amended answer.

Wherefore, plaintiff prays judgment and decree as prayed for in its amended complaint herein.

[redacted]
Attorneys for Plaintiff

State of Washington, }
County of Spokane. } ss.

[redacted] being first duly sworn upon oath deposes and says: That he is general agent for the Northern Pacific Railway Company, plaintiff in the above entitled action, located at and residing in the city of Spokane in Spokane county, State of Washington, and makes this affidavit of verification for and on behalf of said plaintiff; that he has read the foregoing reply and knows the contents thereof, and the same is true as he verily believes.

[redacted]

Subscribed and sworn to before me this [redacted] day of December, 1900.

[redacted]
Notary Public in the State of Washington,
Residing at Spokane, Washington.

[redacted]

Attorneys for Defendant.

Filed Dec. 7 1900 at [redacted] o'clock p. m.

[redacted]
[redacted]

Subscribed and sworn to before me this 5th day of December, 1899.

E. T. WHITE,
Notary Public for the State of Washington,
Residing at Spokane, Washington.

Due service of within reply by receipt of a true copy thereof admitted this 5th day of Dec. 1899.

——— ———,
Attorneys for Def'ts Browne.

Filed Dec. 5 1899 at 3:10 o'clock p. m.
JAMES A. DRAIN, *Clerk.*
E. G. DRAIN, *Deputy*

In the Superior Court of the State of Washington for Spokane County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff, vs. WILLIAM S. ELY ET AL., Defendants.	Reply to Amended Answer of Defendant The Equitable Trust Company.

Comes now the plaintiff above named and for reply to the amended answer of defendant The Equitable Trust Company,

1. Denies each and every allegation, matter and thing contained in the affirmative matter and defenses pleaded in said amended answer.

2. Denies each and every allegation, matter and thing contained in what is designated as "affirmative answer and by way of counter claim," pleaded in said amended answer, which is the first affirmative matter or defense pleaded in said amended answer.

3. Denies each and every allegation, matter and thing contained in what is designated as "further affirmative amended answer," pleaded in said amended answer, which is the second affirmative matter or defense pleaded in said amended answer.

99 4. Denies each and every allegation, matter and thing contained in what is designated as "further amended answer," pleaded in said amended answer, which is the third affirmative matter or defense pleaded in said amended answer.

Wherefore plaintiff prays judgment and decree as prayed for in its amended complaint herein.

STEPHENS & BUNN,
Attorneys for Plaintiff.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Jno. W. Hill, being first duly sworn, upon oath deposes and says:—That he is general agent for The Northern Pacific Railway Company, plaintiff in the above entitled action, located at and residing in the city of Spokane, in Spokane county, State of Washington, and makes this affidavit of verification for and on behalf of said plaintiff; that he has read the foregoing reply and knows the contents thereof, and the same is true as he verily believes.

JNO. W. HILL.

Subscribed and sworn to before me this 5th day of December, 1899.

E. T. WHITE,
Notary Public for the State of Washington,
Residing at Spokane, Washington.

Due service of the within reply by receipt of a true copy thereof admitted this 5th day of Dec. 1899.

____ ____,
Attorneys for Def't Equt. Tr. Co.

Filed Dec. 5 1899 at 3:10 o'clock p. m.
JAMES A. DRAIN, *Clerk.*
E. G. DRAIN, *Deputy.*

100 In the Superior Court of the State of Washington for Spokane County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff, vs. WILLIAM S. ELY ET AL., Defendants.	Reply to Amended Answer of Defendant Northwestern and Pacific Hypotheek-bank.

Comes now the plaintiff, above named, and for reply to the amended answer of defendant Northwestern and Pacific Hypotheek-bank,

1. Denies each and every allegation, matter and thing contained in the affirmative matter and defenses, pleaded in said amended answer.

2. Denies each and every allegation, matter and thing contained in what is designated as "further amended answer and by way of affirmative matter or defense pleaded in said amended answer, which is the first affirmative matter or defense pleaded in said amended answer.

3. Denies each and every allegation, matter and thing contained in what is designated as "further answer and by way of affirmative

defense and counter claim," pleaded in said amended answer, which is the second affirmative matter or defense pleaded in said amended answer.

4. Denies each and every allegation, matter and thing contained in what is designated as "further amended answer," pleaded in said amended answer, which is the third affirmative matter or defense pleaded in said amended answer.

Wherefore plaintiff prays for judgment and decree as prayed for in its amended complaint herein.

STEPHENS & BUNN,
Attorneys for Plaintiff.

STATE OF WASHINGTON, }
County of Spokane, } *ss:*

Jno. W. Hill, being first duly sworn, upon oath deposes and says; that he is the general agent for The Northern Pacific Railway Company, plaintiff in the above entitled action, located at and residing in the city of Spokane, in Spokane county, State of Washington, and makes this affidavit of verification for and on behalf of said plaintiff; that he has read the foregoing reply and knows the
101 contents thereof, and the same is true as he verily believes.

JNO. W. HILL.

Subscribed and sworn to before me this 5th day of December, 1899.

E. T. WHITE,
Notary Public for the State of Washington,
Residing at Spokane, Washington.

Due service of within reply by receipt of a true copy thereof admitted this 5th day of Dec. 1899.

———— ————,
Attorneys for Def't N. W. & H. Bank.

Filed Dec. 5 1899 at 3:10 o'clock p. m.
JAMES A. DRAIN, *Clerk.*
E. G. DRAIN, *Deputy.*

In the Superior Court of the State of Washington in and for the County of Spokane.

NORTHERN PACIFIC RAILWAY Company, Plaintiff, *vs.* WILLIAM S. ELY ET AL., Defendants. } Reply to Amended Answer of Defendants Claribel Kaufman and Isaac S. Kaufman.

Comes now the plaintiff above named, and for reply to the amended answer of defendants Claribel Kaufman and Isaac S. Kaufman.

1. Denies each and every allegation, matter and thing contained

in the affirmative matter and defenses pleaded in said amended answer.

2. Denies each and every allegation, matter and thing contained in what is designated as "affirmative answer and by way of counter-claim" pleaded in said amended answer, which is the first affirmative matter, or defense pleaded in said amended answer.

3. Denies each and every allegation, matter and thing contained in what is designated as "further and second affirmative answer," pleaded in said amended answer, which is the second affirmative matter or defense, pleaded in said amended answer.

4. Denies each and every allegation, matter and thing con-
102 tained in what is designated as "third affirmative answer," pleaded in said amended answer, which is the third affirmative matter, or defense, pleaded in said amended answer.

Wherefore plaintiff prays for judgment and decree as prayed for in its amended complaint herein.

STEPHENS & BUNN,
Attorneys for Plaintiff.

STATE OF WASHINGTON, }
County of Spokane, } ss:

Jno. W. Hill, being first duly sworn, upon oath deposes and says, that he is the general agent for The Northern Pacific Railway Company, plaintiff in the above entitled action, located at and residing in the city of Spokane, in Spokane county, State of Washington, and makes this affidavit of verification for and on behalf of said plaintiff; that he has read the foregoing reply and knows the contents thereof, and the same is true, as he verily believes.

JNO. W. HILL.

Subscribed and sworn to before me this 5th day of December, 1899.

E. T. WHITE,
Notary Public for the State of Washington,
Residing at Spokane, Washington.

Due service of within reply by receipt of a true copy thereof admitted this 5th day of December, 1899.

____ ____,
Attorneys for Def'ts Kaufman.

Filed Dec. 5 1899 at 3:10 o'clock p. m.

JAMES A. DRAIN, *Clerk.*
E. G. DRAIN, *Deputy.*

103 In the Superior Court of the State of Washington for Spokane County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
WILLIAM S. ELY ET AL., Defendants.

Reply to Amended Answer of Defendant Jennie McKenzie.

Comes now the plaintiff above named, and for reply to the amended answer of defendant Jennie McKenzie,

1. Denies each and every allegation, matter and thing contained in the affirmative matter and defenses pleaded in said amended answer.

2. Denies each and every allegation, matter and thing contained in what is designated as "affirmative answer," pleaded in said amended answer, which is the first affirmative matter or defense pleaded in said amended answer.

3. Denies each and every allegation, matter and thing contained in what is designated as "further affirmative answer and by way of counter claim," pleaded in said amended answer, which is the second affirmative matter or defense pleaded in said amended answer.

4. Denies each and every allegation, matter and thing contained in what is designated as "further affirmative answer," pleaded in said amended answer, which is the third affirmative matter or defense pleaded in said amended answer.

5. Denies each and every allegation, matter and thing contained in what is designated as "further affirmative answer" pleaded in said amended answer, which is the fourth affirmative matter or defense pleaded in said amended answer.

Wherefore plaintiff prays for judgment and decree as prayed for in its amended complaint herein.

STEPHENS & BUNN,
Attorneys for Plaintiff.

104 STATE OF WASHINGTON, } ss:
County of Spokane, }

Jno. W. Hill being first duly sworn upon oath deposes and says: That he is general agent for The Northern Pacific Railway Company, plaintiff in the above entitled action, located at and residing in the city of Spokane, in Spokane county, State of Washington, and makes this affidavit of verification for and on behalf of said plaintiff; that he has read the foregoing reply and knows the contents thereof and the same is true as he verily believes.

JNO. W. HILL.

Subscribed and sworn to before me this 5th day of December, 1899.

E. T. WHITE,
Notary Public for the State of Washington,
Residing at Spokane, Washington.

Due service of within reply by receipt of a true copy thereof admitted this 5th day of Dec. 1899.

____ ____,
Attorneys for Def't Jennie McKenzie.

Filed Dec. 5 1899 at 3:10 o'clock p. m.
JAMES A. DRAIN, *Clerk.*
E. G. DRAIN, *Deputy.*

In the Superior Court of the State of Washington for Spokane County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff, *vs.* WILLIAM S. ELY ET AL., Defendants.	Reply to Amended Answer of Defendants Marvin Arnold, Julia Arnold, and Gustave Reith.

Comes now the plaintiff and for reply to the amended answer of defendants Marvin Arnold, Julia Arnold and Gustave Reith,

1. Denies each and every allegation, matter and thing contained in the affirmative matter and defenses pleaded in said amended answer.

2. Denies each and every allegation, matter and thing contained in what is designated as "affirmative answer," pleaded in said amended answer, which is the first affirmative matter or de-
105 fense pleaded in said amended answer.

3. Denies each and every allegation, matter and thing contained in what is designated as "second affirmative answer," pleaded in said amended answer, which is the second affirmative matter or defense pleaded in said amended answer.

4. Denies each and every allegation, matter and thing contained in what is designated as "third affirmative answer," pleaded in said amended answer.

5. Denies each and every allegation, matter and thing contained in what is designated as "fifth affirmative answer" pleaded in said amended answer, which is the fourth affirmative matter or defense pleaded in said answer.

6. Denies each and every allegation, matter and thing contained in what is designated as "sixth affirmative answer," pleaded in said amended answer, which is the fifth affirmative matter or defense pleaded in said amended answer.

7. Denies each and every allegation, matter and thing contained

in what is designated "seventh affirmative answer" pleaded in said amended answer, which is the sixth affirmative matter or defense pleaded in said amended answer.

8. Denies each and every allegation, matter and thing contained in what is designated as "eighth affirmative answer" pleaded in said amended answer, which is the seventh affirmative matter or defense pleaded in said amended answer.

9. Denies each and every allegation, matter and thing contained in what is designated as "ninth affirmative answer" pleaded in said amended answer, which is the eight- affirmative matter or defense pleaded in said amended answer.

Wherefore plaintiff prays for judgment and decree as prayed for in its amended complaint herein.

STEPHENS & BUNN,
Attorneys for Plaintiff.

106 STATE OF WASHINGTON, } ss:
County of Spokane, }

Jno. W. Hill, being first duly sworn upon oath deposes and says: That he is the general agent for The Northern Pacific Railway Company plaintiff in the above entitled action, located at and residing in the city of Spokane, in Spokane county, State of Washington and makes this affidavit of verification for and on behalf of said plaintiff; that he has read the foregoing reply and knows the contents thereof, and the same is true as he verily believes.

JNO. W. HILL.

Subscribed and sworn to before me this 5th day of December, 1899.

E. T. WHITE,
Notary Public for the State of Washington,
Residing at Spokane, Washington.

Filed Dec. 5, 1899 at 3:10 o'clock p. m.

JAMES A. DRAIN, *Clerk.*
E. G. DRAIN, *Deputy.*

Due service of the within reply by receipt of a true copy thereof admitted this 5th day of Dec. 1899.

JAMES DAWSON,
Attorney for Def'ts Arnold et al.

In the Superior Court of the State of Washington for Spokane County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff, *vs.* WILLIAM S. ELY ET AL., Defendants. } Reply to Amended Answer of Defendant Anton Hahn.

Comes now plaintiff above named, and for reply to the amended answer of Anton Hahn,

1. Denies each and every allegation, matter and thing contained in the affirmative matter, and defenses pleaded in said amended answer.

2. Denies each and every allegation, matter and thing contained in what is designated as "further and affirmative amended
107 answer" pleaded in said amended answer, which is the first affirmative matter or defense pleaded in said amended answer.

3. Denies each and every allegation, matter and thing contained in what is designated as "further and affirmative amended answer," pleaded in said amended answer, which is the second affirmative matter or defense pleaded in said amended answer.

4. Denies each and every allegation, matter and thing contained in what is designated as "further and affirmative answer," pleaded in said amended answer, which is the third affirmative matter or defense pleaded in said amended answer.

Wherefore plaintiff prays for judgment and decree as prayed for in its amended complaint herein.

STEPHENS & BUNN,
Attorneys for Plaintiff.

STATE OF WASHINGTON, *County of Spokane,* } ss:

Jno. W. Hill, being first duly sworn, upon oath deposes and says: That he is general agent for The Northern Pacific Railway Company, plaintiff in the above entitled action, located at and residing in the city of Spokane, in Spokane county, State of Washington, and makes this affidavit for and on behalf of said plaintiff; that he has read the foregoing reply and knows the contents thereof, and the same is true as he verily believes.

JNO. W. HILL.

Subscribed and sworn to before me this 5th day of December, 1899.

E. T. WHITE,
Notary Public for the State of Washington,
Residing at Spokane, Washington.

Due service of within reply by receipt of a true copy thereof admitted this 5th day of Dec. 1899.

JOHN B. HESS &
SCOTT & ROSSLOW,
Attorneys for Def't Hahn.

Filed Dec. 5 1899 at 3:10 o'clock p. m.

JAMES A. DRAIN, *Clerk.*
E. G. DRAIN, *Deputy.*

108 In the Superior Court of the State of Washington in and for the County of Spokane.

NORTHERN PACIFIC RAILWAY Company, Plaintiff, *vs.* WILLIAM S. ELY ET AL., Defendants. } No. 13258. Reply to Amended Answer of Defendants Covert August and Pauline E. August.

Comes now the plaintiff and for reply to the amended answer of defendants Covert August and Pauline E. August:—

1. Denies each and every allegation, matter and thing contained in the affirmative matter and defenses pleaded in said amended answer.

—. Defendants deny each and every allegation matter and thing contained in what is designated as "defendants' further answer" pleaded in said amended answer, which is the first affirmative matter or defense pleaded in said amended answer.

3. Denies each and every allegation, matter and thing contained in what is designated as "second and further affirmative defense" pleaded in said amended answer, which is the second affirmative — or defense pleaded in said amended answer.

4. Denies each and every allegation, matter and thing contained in what is designated as "third and further affirmative defense," pleaded in said amended answer, which is the third affirmative matter or defense pleaded in said amended answer.

Wherefore plaintiff prays judgment and decree as prayed for in its amended complaint herein.

STEPHENS & BUNN,
Attorneys for Plaintiff.

STATE OF WASHINGTON, *County of Spokane,* } ss:

Jno. W. Hill, being duly sworn, upon oath deposes and says: That he — general agent for The Northern Pacific Railway Company plaintiff in the above entitled action, located at and residing in the city of Spokane, in Spokane county, State of Washington, and

makes this affidavit of verification for and on behalf of said
109 plaintiff; that he has read the foregoing reply and knows the contents thereof and the same is true as he verily believes.

JNO. W. HILL.

Subscribed and sworn to before me this 6th day of December, 1899.

E. T. WHITE,
Notary Public in and for the State of Washington, Residing at Spokane, said State.

Due service of within reply by receipt of a true copy thereof admitted this — day of December, 1899.

—— ——,
Attorney for Def'ts Covert and Pauline August.

Filed Dec. 7 1899 at 9:25 o'clock a. m.
JAMES A. DRAIN, *Clerk.*
E. G. DRAIN, *Deputy.*

In the Superior Court of the State of Washington in and for the County of Spokane.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff, *vs.* WILLIAM S. ELY ET AL., Defendants.	Reply to Amended Answer of Z. Colby and Sophia Colby.

Comes now the plaintiff above named and for reply to amended answer of defendants Z. Colby and Sophia Colby herein, in the above entitled action.

I. Denies each and every allegation, matter and thing contained in the affirmative matter and defenses pleaded in said amended answer.

II. Plaintiff denies each and every allegation matter and thing contained in the first affirmative answer pleaded in said amended answer of Z. Colby and Sophia Colby herein.

III. Plaintiff denies each and every allegation, matter and thing contained in the second affirmative answer and defense pleaded in said amended answer of Z. Colby and Sophia Colby herein.

STEPHENS & BUNN,
Attorneys for Plaintiff.

110 STATE OF WASHINGTON, } ss:
County of Spokane, }

Jno. W. Hill, being first duly sworn upon oath deposes and says: That he is an officer of The Northern Pacific Railway Company, a

corporation, plaintiff in the above entitled action, towit:—its general agent at and in the city and county of Spokane, State of Washington, and makes this affidavit for and on its behalf; that he has read the above and foregoing reply to the separate and amended answer of Z. Colby and Sophia Colby, and knows the contents thereof, and that the same is true as he verily believes.

JNO. W. HILL.

Subscribed and sworn to before me this 28th day of December, 1899.

H. M. STEPHENS,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

Due service of within reply to amended answer of Z. Colby and Sophia Colby by receipt of a true copy thereof admitted this 28 day of December.

J. B. HESS AND
SCOTT & ROSSLOW,
Attorney- for Def'ts Colby.

Filed Dec. 28 1899 at 4.50 o'clock p. m.
JAMES A. DRAIN, *Clerk.*
E. G. DRAIN, *Deputy.*

111

Verdict for Defendant.

Case No. 13258.

We the jury in the case of Northern Pacific Railway Co., plaintiff *vs.* Wm. S. Ely *et al.*, on the answer of Eugene Germond and Claudie Germond, his wife, and Jacob Loerchter, defendants. find for the defendants, that the plaintiff is not entitled to the possession of the property described in the complaint for which said defendants are defending, or any part thereof, and that said property is the property of said defendants in fee simple.

Spokane, Washington Dec. 15th, 1899.

H. H. NOBLE, *Foreman.*

Entered and filed Dec. 5" 1899.
JAMES A. DRAIN, *Clerk.*
M. M. RICHARDSON, *Deputy.*

Verdict for Defendant.

Case No. 13258.

We the jury in the case of Northern Pacific Railway Co., plaintiff, *vs.* Wm. Ely *et al.*, on the answer of Joseph Goodner and Sallie Goodner, his wife, defendant-. find for the defendants that the plaintiff is

not entitled to the possession of the property described in the complaint for which said defendants are defending, or any part thereof; that said property is the property of said defendants in fee simple.

Spokane, Washington, Dec. 6th 1899.

JAMES A. JUSTICE, *Foreman.*

Entered and filed Dec. 6", 1899

JAMES A. DRAIN, *Clerk,*
By M. M. RICHARDSON, *Deputy.*

112 *Verdict for Defendant.*

Case No. 13258.

We the jury in the case of Northern Pacific Railway Co., plaintiff *vs.* Wm. S. Ely *et al.* on the answer of Michael Blessing and Mary Blessing, his wife, defendants, find for defendants; that the plaintiff is not entitled to the possession of the property described in the complaint for which said defendants are defending, or any part thereof, and that said property is the property of said defendants in fee simple.

Spokane Wasnington, Dec. 6th, 1899.

ETHAN ALLEN, *Foreman.*

Entered and filed Dec 6" 1899.

JAMES A. DRAIN, *Clerk,*
By M. M. RICHARDSON, *Deputy.*

Verdict for Defendant.

Case No. 13258.

We the jury in the case of Northern Pacific Railway Company, plaintiff, *vs.* William S. Ely *et al.* on the answer of Covert August and Pauline E. August, his wife, defendants, find for defendants, and that the plaintiff is not entitled to the possession of the property described in the complaint for which said defendants are defending, or any part thereof, and that the said property is the property of said defendants in fee simple.

Spokane, Washington, December 7, 1899.

WALTER FRANCE, *Foreman.*

Entered and filed Dec. 7, 1899.

JAMES A. DRAIN, *Clerk,*
By M. M. RICHARDSON, *Deputy.*

[illegible]

[illegible]

[illegible]

[illegible]

Verdict for Defendant.

Case No. 13258.

We the jury in the case of Northern Pacific Railway Co., plaintiff, *vs.* Wm. S. Ely *et al.* on the answer of Z. Colby and Sophia Colby, his wife, defendants, find for the defendants and that the plaintiff is not entitled to the possession of the property described in the complaint for which said defendants are defending, or any part thereof, and that said property is the property of said defendants in fee simple.

Spokane, Washington, December 28th, 1899.

PRICE FRUIT, *Foreman.*

Entered and filed Dec. 28 1899.

JAMES A. DRAIN, *Clerk,*
By M. M. RICHARDSON, *Deputy.*

116 Superior Court Journal.

TUESDAY, *the 5" Day of September, 1899.*

Court convened at 9:30 a. m.
Present the Hon. Leander H. Prather, judge presiding.

NORTHERN PACIFIC RAILWAY CO., Plaintiff,
vs.
JENNIE MCKENZIE, Defendant.

Comes now the plaintiff herein by H. M. Stevens and the defendant personally and by Blake & Post, her attorneys and announce ready for trial. Comes a jury of twelve good and lawful men drawn from the body of Spokane county and having been sworn to try the cause; the plaintiff introduced its evidence (oral and documentary) and the defendant introduced its evidence and rested. The plaintiff's motion to take the case from the jury and render judgment for the pl'ff is denied. The counsel for the defendants challenge- the legal sufficiency of the evidence and moved the court to take the case from the jury and enter judgment for the defendant, and being advised the court discharged the jury from the further consideration of the case and ordered that judgment be entered in favor of the defendant. To which the plaintiff excepts and exception allowed.

LEANDER H. PRATHER, *Judge.*

Superior Court Journal 60, page 160.

117 In the Superior Court of the State of Washington in and for the County of Spokane.

NORTHERN PACIFIC RAILWAY Company, Plaintiff, vs. WILLIAM S. ELY ET AL., Defendants.	No. 13258. Findings of Fact Presented and Requested by Plaintiff before the Court Made, Signed or Filed Findings upon the Issues Raised by Answer of Defendant Ely.

Upon the issues raised by the amended complaint, answer of defendant and William S. Ely and reply thereto, jury being waived, from the evidence the court found the following facts, to wit:—

I. That each and all of the allegations contained in the amended complaint of plaintiff herein as to defendant William S. Ely are true.

II. That plaintiff is the owner of a strip of land four hundred (400) feet wide, over, upon and across the premises described in the amended complaint of plaintiff herein, which land was granted to the Northern Pacific Railroad Company by act of Congress entitled:—"An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound on the Pacific coast, by the northern route," approved July 2, 1864, and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

III. That the Northern Pacific Railroad Company complied with all the terms, provisions and conditions of said act and operated a railroad upon a line definitely located through Spokane county, State of Washington, since the summer of 1881, until receivers of said company were appointed and thereafter said receivers operated said road until September 1, 1896, upon which date said plaintiff became the owner of said railroad and right of way so granted as aforesaid, and, ever since said date, has operated trains upon and over said road daily and continuously.

IV. That the line of definite location of said road was fixed on October 4, 1880, and the road was constructed on the line of definite location.

118 V. That the said lands were public lands at the date of said grant and the date of definite location of said road as aforesaid.

VI. That plaintiff is entitled to the sole and exclusive possession of the whole and every part of said right of way, to wit, a strip of land four hundred (400) feet wide upon, over and across the premises described in the amended complaint of plaintiff herein as follows:

Sections 24, 26, 32 and 34 in township 26 north, range 45 east, W. M.; sections 5 and 6 in township 25 north, range 45 east, W. M.; sections 4, 8 and 9, in township 25 north, range 44 east, W. M.; sec-

tions 12 and 14 in township 25 north, range 43 east, W. M.; sections 12, 22 and 28, in township 24 north, range 42 east, W. M.; sections 4 and 6 in township 23 north, range 42 east, W. M.; sections 14, 22, 27, 28 and 29 in township 23 north, range 41 east, W. M.; the south half of the northeast quarter of section 24 in township 25 north, range 42 east, W. M., wrongfully platted as a part of Cannon's addition to the city of Spokane Falls (now Spokane); the north half of the northeast quarter of section 24, in township 25 north, range 42 east, W. M., wrongfully platted as a part of Brown's addition to the city of Spokane Falls (now Spokane); the southeast quarter of the southeast quarter of section 18, in township 25 north, range 43 east, W. M., wrongfully platted as a part of Havermale's addition to the city of Spokane Falls (now Spokane); the northwest quarter of the northwest quarter of section 20 in township 55 north, range 43 east, W. M., wrongfully platted as a part of Saunders' addition to the city of Spokane Falls (now Spokane); and that portion of the northeast quarter of the southwest quarter of section 24, in township 25 north, range 42 east, wrongfully platted as lots 11, 12 and 13 of block 2, of Cœur d'Alene addition to the city of Spokane Falls (now Spokane); situate in the county of Spokane, Territory (now State,) of Washington.

VII. That defendant, William S. Ely is wrongfully and unlawfully in possession of a certain portion of said right of way usually known and described as lot one (1), block three (3) of Havermale's addition to the city of Spokane Falls (now Spokane), and wrongfully claims title thereto.

119 VIII. That all that portion of said land within two hundred (200) feet of the line of definite location and construction of said road belongs to and is owned by plaintiff under the said act of Congress.

Each and all of the foregoing proposed findings of fact refused and denied this 10th day of April, 1900.

LEANDER H. PRATHER, *Judge.*

Conclusions of Law.

The court finds as conclusions of law:—

I. That the premises in question between plaintiff and defendant William S. Ely is a part of the right of way of plaintiff granted to its predecessor, the Northern Pacific Railroad Company, by act of Congress, approved July 2, 1864, entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound, on the Pacific coast, by the northern route," and cannot be aliened or disposed of by such grantee or its successor in title or interest, and that, consequently, such right of way could not be acquired by adverse possession under State statutes.

II. That Congress, in and by said act, has continuously determined the width of right of way necessary for the use of the Government grantee, to wit, the Northern Pacific Railroad Company, and its successors in interest.

III. That the plaintiff places its alleged title distinctly upon the construction, scope and effect to be given to said act of Congress and claims that by title which it has and possesses under said act it is thereby entitled to the whole of the right of way so granted to it, a strip of land four hundred (400) feet wide, where it passes through, upon, over and across the premises mentioned and described in the preceding findings of fact.

IV. That the court is without jurisdiction to adjudge or determine that a lesser amount than that fixed by said act of Congress, as the width of said right of way is needed or used.

Each and all of the foregoing proposed conclusions of law
120 refused and denied this 10 day of April, 1900.

Done in open court this 10th day of April, 1900.

LEANDER H. PRATHER, *Judge.*

Filed Apr. 18, 1900, at 10 o'clock a. m.

JAMES A. DRAIN, *Clerk.*
FRED W. LUELLING, *Deputy.*

Superior Court, State of Washington, Spokane County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
WILLIAM S. ELY ET AL., Defendants.

The above entitled action having been heretofore tried before the undersigned, and a jury trial having been waived therein, the court now makes and finds the following findings of fact and conclusions of law.

Findings of Fact.

I.

That the above entitled plaintiff is the successor in interest of any rights herein of a corporation known as the Northern Pacific Railroad Company.

II.

That the defendant William S. Ely, prior to the commencement of this action, was the owner and held the legal title to the premises described as lot one, block three of Havermale's addition to the city of Spokane Falls, now Spokane, Washington, according to the recorded plat thereof of record in the office of the auditor of Spokane county, Washington.

III.

That prior to the year 1886, one S. G. Havermale and his wife Elizabeth Havermale, were the owners and had the fee simple title to a large tract of land lying in the vicinity of what are known as Riverside avenue, Sprague avenue and Division street, in the
121 city of Spokane, Washington, and which included the property described as said lot one, block three of said Havermale's addition and that while the owners of said property, and duly entitled to plat the same, the said Havermale and wife duly filed and caused to be recorded prior to the year 1886, in the office of the auditor of Spokane county, Washington, a plat of what is now known as Havermale's addition, and which included lot one, of block three, above described.

IV. That said plat has ever since remained of record and ever since said year 1886 was known by the said Northern Pacific Railroad Company and to the plaintiff herein, as its successor, to be of record, and that no objection of any kind, name or nature was ever made or filed by the plaintiff herein or its predecessor to the filing of said plat or to the appropriating of all the property described in said plat as the property of the said Havermales and which included said lot one, block three of said Havermales' addition, and said lot, according to said plat, extended from Riverside and Sprague avenues, along the west side of Division street in the said city of Spokane, Washington, and included that portion of the property claimed by the plaintiff herein as belonging to it by reason of its so called right of way across said property.

V. That while the said property was thus platted and belonged to the said Havermales and with the full knowledge and consent of the Northern Pacific Railroad Company, the said lot one, block three, of said addition was duly conveyed by deed duly recorded in the office of the auditor of Spokane county, Washington, to one J. M. Landis, more than ten years prior to the commencement of the within entitled action, and that said Landis thereafter conveyed said property, and more than ten years prior to the commencement of this action, to one P. L. Kearney in good faith and without knowledge of any claim or pretended claim on the part of the plaintiff or its predecessors in title or interest, and the said Kearney, also in good faith, and without any knowledge of any such claim of the plaintiff or its predecessors in title or interest, conveyed to one W. J. Dwyer, who purchased similarly and under the same cir-
122 cumstances as to lack of knowledge or any equities or rights of plaintiff or its predecessors in title or interest, and duly conveyed the said property to one Alice Houghton and H. M. Williams, who also took said property without notice or knowledge of any rights or equities of plaintiffs or its predecessors in title or interest, and the said Williams, more than ten years prior to the commencement of this action, conveyed the said property to the said Alice Houghton, in whom the ownership of said property was vested,

and who had a title thereto of record more than ten years prior to the commencement of this action.

That all of said persons herein referred to became purchasers of said property in good faith and for a valuable consideration without knowledge of any claim of title or possession in and to any of said property on the part of the plaintiff herein or its predecessors in title or interest & each and every of them were in the open & notorious possession of the same & enjoyed the use & occupancy thereof to the full knowledge of the plaintiff & its predecessors in title & interest for at least ten years prior to the commencement of this action.

VI. That while in the free and uninterrupted possession of the said property herein described, and while the owners thereof, the said different owners hereinbefore referred to took actual possession of the said property and improved the same by erecting a building thereon and by causiag a fence to be put around the boundaries thereof as bounded by said plat filed by the said Havermale, and hereinbefore referred to, and paid the taxes and assessments on the said property, all without protest or interference from the plaintiff or its predecessors in title or interest, and that the defendant William S. Ely, expended large sums of money in the payment of taxes assessments, and paying back taxes due at the time of the ownership of said property by the said Alice Houghton, and in causing a sewer to be built upon said property, and did collect rents from persons occupying the said property, all without let or hinderance or objection from the plaintiff herein or its predecessors in title or interest. And that such occupancy and ownership of said property had continued for upwards of ten years prior to the commencement of the within action.

123 VII. That the said Riverside and Sprague avenues and Division street have all been used as public thoroughfares by the citizens of Spokane, Washington, for upwards of ten years prior to the commencement of this action, and ever since have been used and occupied as public streets, and especially the south portion of said lot one, according to the boundaries thereof as claimed by the plaintiff herein, which said portion has been used by the public in general, a sidewalk being built thereon and a road laid out thereon, and is known as a public street upon which street cars have run for many years without let or hinderance from the plaintiff or its predecessors in title or interest.

VIII. That the defendant William S. Ely herein acquired title to the said premises known as lot one, block three, aforesaid, by the foreclosure of a mortgage made by the said Alice Houghton and her husband to secure the sum of $7,500.00 and interest, and which mortgage was foreclosed in the superior court of Spokane county, and said property sold under a judgment obtained in said action and execution issued thereon to satisfy a judgment of $8,687.50 with interest at eight per cent. per annum from April 28th, 1894, and $750.00 attorney's fee and costs of the suit.

That said property was duly sold on June 5th, 1894, and bid in by the said William S. Ely, this defendant, and although upwards of one year from the time of the said sale and the issuance of a sheriff's certificate of sale to this defendant had expired, no redemption of said property was had, and the defendant, in the year 1895 became, and ever since has been, the owner and in possession of said property.

Dated this 15th day of May, 1900.

LEANDER H. PRATHER, *Judge.*

Conclusions of Law.

I.

That the defendant William S. Ely is the owner in fee simple of lot one, block three, of Havermale's addition to the city of Spokane Falls, now Spokane, Washington, according to the recorded plat thereof of record in the office of the auditor of Spokane county, Washington.

124 II. That his predecessors in interest were the owners of said property in fee simple and were in the uninterrupted occupancy, possession and ownership thereof for upwards of ten years prior to the commencement of the within action.

III. That the plaintiff herein, neither by itself or predecessors in interest or title, has or had any right, title or interest in said property, by reason of any of the facts alleged in the complaint or otherwise, and has no paramount right or ownership in the said property as against the defendant William S. Ely.

3½. That the predecessors in title & ownership in the defendant Ely to said lot three, block one, Havermale's addition, were in the open & notorious possession of & exercised proper acts of ownership and possession thereof for a period of over ten years prior to the commencement of this action.

IV. That the defendant William S. Ely is entitled to the free and uninterrupted use and enjoyment of said property, and that his title thereto be quieted and freed from any claim or pretended claim of the plaintiff herein or its predecessors in interest, as claimed in the complaint herein or otherwise, and that said defendants is entitled to the costs of defending this action to be taxed by the clerk of this court.

Dated, Spokane, Washington, May 15th 1900.

LEANDER H. PRATHER.

Filed May 15 1900 at 9:35 o'clock a. m.

JAMES A. DRAIN, *Clerk.*
J. O. PETERSON, *Deputy.*

125 In the Superior Court of the State of Washington in and for the County of Spokane.

NORTHERN PACIFIC RAILWAY Company, Plaintiff, *vs.* WILLIAM S. ELY ET AL., Defendants.	No. 13258. Exceptions to Findings of Fact and Conclusions of Law and to Refusal to Make and Sign Findings of Fact and Conclusions of Law.

Comes now the plaintiff, The Northern Pacific Railway Company, and excepts to findings of fact presented by defendant William S. Ely, which findings of fact were made, found and filed herein by the court as follows, to wit:—

I. Plaintiff excepts to finding of fact No. 2 and the whole and every part thereof.

II. Plaintiff excepts to finding of fact No. 3 and the whole and every part thereof.

III. Plaintiff excepts to finding of fact No. 4 and the whole and every part thereof.

IV. Plaintiff excepts to finding of fact No. 5 and the whole and every part thereof.

V. Plaintiff excepts to finding of fact No. 6 and the whole and every part thereof.

VI. Plaintiff excepts to finding of fact No. 7 and the whole and every part thereof.

VII. Plaintiff excepts to finding of fact No. 8 and the whole and every part thereof.

Plaintiff excepts to conclusions of law presented by said defendant William S. Ely, and made and found by the court herein and filed with the clerk of the court, as follows, to wit:

I. Plaintiff excepts to conclusions of law No. 1 and the whole and every part thereof.

II. Plaintiff excepts to conclusion of law No. 2 and the whole and every part thereof.

III. Plaintiff excepts to conclusions of law No. 3 and the whole and every part thereof.

126 IV. Plaintiff excepts to conclusion of law No. 3-½ and the whole and every part thereof.

V. Plaintiff excepts to conclusion of law No. 4 and the whole and every part thereof.

Plaintiff excepts to the failure and refusal of the court to make, adopt and sign the findings of fact presented herein upon the trial of the issues made and raised by the amended complaint, answer of said William S. Ely and reply thereto, in this action, and excepted at the time when the court failed to make, adopt, sign or file said findings of fact, or either of them, and also, at said time, excepted to the failure and refusal of the court to make, adopt, sign and file the conclusions of law prepared and presented herein by the plaintiff

and said plaintiff excepted to the failure and refusal of the court to make each of said findings of fact and each of said conclusions of law.

STEPHENS & BUNN,
Attorneys for Plaintiff.

The above and foregoing exceptions were duly taken and allowed in open court, at the time of said failure and refusal of the court, as therein stated and mentioned.

LEANDER H. PRATHER, *Judge.*

Filed May 15 1900 at 9:35 o'clock a. m.

JAMES A. DRAIN, *Clerk.*
J. O. PETERSON, *Deputy.*

127 In the Superior Court of the State of Washington in and for the County of Spokane.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
WM. S. ELY ET AL., Defendants. } No. —. Decree.

The above entitled action came on regularly for hearing and trial, and it appearing to the court that the following named defendants, to-wit:—C. H. Bungar, Alice F. Bungay, Jerry Barry, Johanna Barry, Maria Bennett, William Brandt, Hans Carstens, Ralph L. Clarke, H. C. Davis, Louise Davis, A. L. Davis, John Erickson, Jacob Esch, Catherine Esch, John Edwards, America Edwards, J. H. Fox, A. C. Farrington, Lizzie Farrington, R. J. Fisk, Temperance Fisk, Richard H. Hall, Martha Hall, David Holzman, Frank Johnson, Hannah Johnson, Albert M. Johnson, Eda Johnson, Julius Koehler, Margaret Koehler, George H. Miller, (alias C. P. Hallett,) Robert McKenzie, Anna McKenzie, R. C. McCaffery, A. J. Ottomeier, Annie Ottomeier, James Perry, Maria C. Perry, F. J. J. Quirk, W. M. Ridpath, as special administrator of the estate of Anthony M. Cannon, deceased, W. M. Ridpath, as special administrator of the -state of Jennie F. Cannon, deceased, Jacob Steiner, Stephen D. Stroup, G. Seeberger, —— Seeberger, Anna McKeon Smith, J. Anthony Smith, Spokane and Eastern Trust Company, Victor Schlater, Eugene Schlater, Silas J. Tift, Sarah Tift, Vermont Loan & Trust Company, P. Welch, L. B. Whitten and Georgia B. Whitten, have been duly, legally and personally served with summons and amended complaint herein; that the following named defendants, to wit: Solicitors Loan & Trust Company and Theodora De Witt Cuyler and Effingham B. Morris, assignees, Katherine Allen, Josephine Clarke, Mary Templeton, Selma Eversole, Eleanor D. Cannon, S. D. Jones, Edward T. Cushing, G. O. Buchanan, A. Bush, (doing busi-

ness under the name and style of Ladd & Bush,) H. Ray Budinot, Mrs. M. Leonard, L. L. Greentree, Theodore S. Covernton, John Hand, Ellen Hand, G. A. Davis, Hanna C. Davis, George Lucas, D. Bell, Daniel Stewart, Marcus A. Bettman, Maria Nelson, John McNamara, Ned C. McKinstrey and Edward
128 Stewart have been duly and legally served with summons by publication in the manner authorized and required by law; that no appearance of any kind has been made by the above mentioned defendants, or either of them, within the time authorized by law, or at all, which failure to appear, and the default of said defendants, and each of them, have heretofore been entered by the court; that the following named defendants to wit: Dennis Monagle, D. F. Mulcahey, Max Rauscher, Christina Rauscher, Leopold Zimprick, Anna Zimprick, Hubert Zimprick, Christian Haas and Mary Haas, have been duly, legally and personally served with summons and complaint herein and duly appeared herein by serving and filing demurrers to the amended complaint, which demurrers were overruled and said defendants failed and refused to plead further and order of default was made and entered herein against said defendants upon motion and proof of said default duly made.

After hearing evidence the court finds the allegations of plaintiff's amended complaint as to each and all of said defendants to be true.

The court finds the allegations of said complaint true as to defendants L. Roy Slater, Elmer E. Alexander and Bertie E. Alexander; which defendants after due and regular service of summons and amended complaint, appeared in said action and answered but failed to appear or offer evidence upon the trial.

It is therefore ordered, adjudged and decreed that the plaintiff The Northern Pacific Railway Company is the owner of and entitled to the exclusive possession of a strip of land four hundred feet wide, being two hundred feet on each side of its railroad track, as the same is constructed and operated upon and over the following described premises, to wit:—

Sections 24, 26, 32 and 34, in township 26 north, range 45 east W. M.; sections 5 and 6 in township 25 north, range 45 east W. M.; sections 4, 8 and 9 in township 25 north, range 44 east W. M.; sections 12 and 14 in township 25 north, range 43 east W. M.; sections 12, 22 and 28 in township 24 north, range 42 east W. M.; sections 4 and 6 in township 23 north, range 42 east W. M.; sections
129 14, 22, 27, 28 and 29, in township 23 north, range 41 east W. M.; the south half of the northeast quarter of section 24, in township 25 north, range 42 east, W. M.; wrongfully platted as a part of Cannon's addition to the city of Spokane Falls (now Spokane); the north half of the northeast quarter of section 24, in township 25 north, range 42 east W. M., wrongfully platted as a part of Browne's addition to the city of Spokane Falls (now Spokane); the southeast quarter of the southeast quarter of section 18 in township 25 north, range 43 east W. M. wrongfully platted as

a part of Havermale's addition to the city of Spokane Falls (now Spokane); the northwest quarter of the northwest quarter of section 20, in township 25 north, range 43 east W. M.; wrongfully platted as a part of Saunders' addition to the city of Spokane Falls, now (Spokane); and that portion of the northeast quarter of the southwest quarter of section 24, in township 25 north, range 42 east, wrongfully platted as lots 11, 12 and 13 of block 2 of Cœur d'Alene addition to the city of Spokane Falls (now Spokane), (except such portions of said strip of land as are hereinafter mentioned and described and decreed to be owned by persons and corporations hereinafter set forth), all of which property is situate in Spokane county, State of Washington.

It is further ordered, adjudged and decreed that said plaintiff is the owner of said strip of land under and by virtue of an act and grant of Congress, to wit, "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound, on the Pacific coast, by the northern route," approved July 2, 1864, as and for railroad right of way, free and discharged of any and all claims or pretended claims of said defendants, or either of them.

It is further adjudged and decreed that the said defendants or either of them, have no right, title, interest or estate in or to said strip of land or right of way, or any part thereof; that said defendants are and each of them is enjoined and forever debarred from asserting any claim whatever, in or to said lands and premises or any part thereof, adverse to plaintiff; that the title of said plaintiff to said right of way is quieted as against said defendants
130 and each of them, and the cloud created by the wrongful claims of said defendants is hereby removed.

This decree is not intended to and does not effect lot 12, block 31 Browne's addition to the city of Spokane, in Spokane county, Washington, which lot is outside of the said right of way.

After service of summons and amended complaint, the following named defendants to wit: Marvin Arnold and Julia Arnold, Covert August and Pauline E. August, Michael Blessing and Mary Blessing, John J. Browne and Anna W. Browne, Z. Colby and Sophia Colby, Equitable Trust Company (impleaded as the Jennings Trust Company) Joseph B. Goodner and Sallie Goodner, Eugene Germond and Claudia A. Germond, Anton Hahn, I. S. Kaufman and Claribel Kaufman, Jacob Loerchter, James McKenzie, Jennie McKenzie, Northwestern and Pacific Hypotheekbank and Gustave Reith appeared and answered, and upon the issues raised by the amended complaint, amended answers, answers and replies, a trial was had before the court and jury duly empaneled and sworn, and after hearing the evidence, argument of counsel and instructions of the court, verdicts were rendered in favor of said defendants for the portions of said right of way claimed by them; respectively, and as hereinafter set forth and described, and that they were the owners

in fee thereof and that plaintiff is not entitled to the possession thereof.

That after service of summons and amended complaint, defendant Ely appeared and answered, and upon the issues raised by the amended complaint, answer and reply, a trial was had before the court without a jury, a jury being waived, and after hearing the evidence and argument of respective counsel, a decision was rendered by the court in favor of said defendant, Ely, for that portion of said right of way claimed by him and as hereinafter set forth and described, and that he was the owner in fee thereof and that plaintiff is not entitled to the possession thereof.

It is further found, adjudged and decreed that Olof Hammerlund, Carl J. Berggren, W. F. Mitchem, Ida Mitchem, James Albi and William Albi, who appeared and answered after being duly served with summons and amended complaint are tenants of Eugene
131 Germond and Jacob Loertcher; and that Henry Willey and Sara Willey, who appeared and answered after being duly served with summons and amended complaint, are tenants of the Northwestern & Pacific Hypotheekbank, and that said defendants have no other rights in or to said premises or any part thereof, except as such tenants.

It is therefore ordered, adjudged and decreed, that Gustave Reith is the owner in fee simple, and is entitled to and is in the exclusive possession of that portion of said right of way lying within the boundaries of what are usually known, designated and described as lots 8 and 9 in block 1 of Saunders' addition to the city of Spokane Falls (now Spokane), and more particularly described as follows, to wit:—

Beginning at a point where the south line of said right of way intersects the east boundary line of said lot nine, running thence north along the east boundary line of said lot nine, fifty-seven and 36/100 feet, more or less, to the northeast corner of said lot nine; thence west along the north boundary line of said lot nine and the north boundary line of said lot eight, fifty feet, more or less, to the northwest corner of said lot eight; thence south along the west boundary line of said lot eight, eighty and 60/100 feet more or less, to a point where the south boundary line of said right of way intersects the west boundary line of said lot eight; thence in an easterly direction along the south boundary line of said right of way to the place of beginning.

And it is further ordered, adjudged and decreed that the title of said defendant be, and it is hereby quieted as against plaintiff; and it is further ordered and adjudged that said defendants do have and recover of and from plaintiff their costs and disbursements herein, taxed at $—. That Marvin Arnold and Julia Arnold are in the actual possession of said premises as tenants of Gustave Reith.

It is further ordered, adjudged and decreed that Covert August and Pauline E. August are the owners in fee simple, and entitled to and are in the exclusive possession of that portion of said right of

way lying within the boundaries of the north half of the northwest quarter, the southeast quarter of the northwest quarter, and
132 the northwest quarter of the northeast quarter of section 28, township 23 north, of range 41 east of the Willamette meridian, and being distant not less than fifty feet at all points from the nearest point in the center of the main line of railroad track of said plaintiff as it is constructed through said section 28.

It is further ordered, adjudged and decreed that the title of said defendants be, and it is hereby, quieted as against plaintiff.

It is further ordered and adjudged that said defendants do have and recover of and from plaintiff their costs and disbursements herein, taxed at $—.

It is further ordered, adjudged and decreed, that John J. Browne and Anna W. Browne are the owners in fee simple and entitled to and in the exclusive possession of that portion of said right of way lying within the boundaries of what are usually designated as lots 10, 11 and 12 in block 13; lots 7, 8, 9, 10, 11 and 12 in block 14; lots 1, 2, 3, 4, 5, and 6 in block 15; lots 1, 2 and 3 in block 16; lots 1, 2 and 3 in block 17; lots 9, 10, 11, 12, 13 and 14 in block 18; lots 5, 6, 7, 8 9 and 10 in block 32; lots 1, 2, 3, 4 and 5 in block 33; lots 6 and 7 in block 34; all of block "A;" in what is usually designated as Browne's addition to Spokane Falls (now Spokane) and being not less than one hundred feet distant at all points from the nearest point in the center of the main line railroad track of plaintiff as said railroad track is now constructed through section 24, township 25 north, range 42 east of the Willamette meridian in the State of Washington.

It is further ordered, adjudged and decreed that the title of said defendants be, and it is hereby quieted as against plaintiff.

It is further ordered, adjudged and decreed that said defendants do have and recover of and from plaintiff their costs and disbursements herein, taxed at $—.

It is further ordered, adjudged and decreed that Z. Colby and Sophia Colby are the owners in fee simple, and entitled to and are in the exclusive possession of that portion of said right of way lying within the boundaries of the northwest quarter of section 14, township 25 north, range 43 east of Willamette meridian, in the State of Washington, and lying on the north side of the main line
133 railroad track of plaintiff, and the south line of which strip is parallel with said track and one hundred and sixty feet distant at all points from the center of said track as it is constructed through said section 14.

It is further ordered, adjudged and decreed that the title of said defendants be, and it is hereby quieted as against plaintiff,

It is further ordered and adjudged that said defendants do have and recover of and from plaintiff their costs and disbursements herein taxed at $—.

It is further ordered adjudged and decreed that William S. Ely, is the owner in fee simple and entitled to and is in the exclusive

possession of that portion of said right of way lying within the boundaries of what is usually designated and described as lot one (1) of block 3 of Havermale's addition to Spokane Falls, now Spokane, Washington.

It is further ordered, adjudged and decreed that the title of said defendant be, and it is hereby quieted as against the plaintiff,

It is further ordered and adjudged that said defendant have and recover of and from plaintiff his costs and disbursements herein, taxed at $—.

It is further ordered, adjudged and decreed, that Joseph B. Goodner and Sallie Goodner are the owners in fee simple and entitled to and are in the exclusive possession of that portion of said right of way described as two certain strips of land, each one hundred and fifty feet wide, one lying on the south side and the other on the north side of plaintiff's railroad track, and running parallel with the same for the full distance that said track runs through the southeast quarter of section 32, township twenty-six north, of range forty-five east of the Willamette meridian, in the county of Spokane, State of Washington, the north line of one of said strips running parallel with said track, and at a uniform distance of fifty feet therefrom, and the south line of the other of said strips running parallel with said track at a uniform distance of fifty feet therefrom.

It is further ordered, adjudged and decreed that the title of said defendants be, and it is hereby, quieted as against plaintiff.

It is further ordered and adjudged that said defendants do
134 have and recover of and from plaintiff their costs and disbursements herein taxed at $—.

It is further ordered, adjudged and decreed, that Eugene Germond Claudia A. Germond and Jacob Loertcher are the owners in fee simple and are entitled to and are in the exclusive possession of that portion of said right of way within the boundaries of what are usually designated and described as lots 10, 11 and 12 in block 1 of Saunders' addition to the city of Spokane Falls (now Spokane).

It is further adjudged and decreed that defendants Olaf Hammerlund, Carl J. Berggren, W. F. Mitchem and Ida Mitchem, James Albi and William Albi are in actual occupancy of the premises last described, as tenants of Eugene Germond, Claudia A. Germond and Jacob Loertcher.

It is further ordered, adjudged and decreed that the title of said defendants be, and it is hereby quieted as against plaintiff.

It is further ordered and adjudged that said defendants do have and recover of and from plaintiff their costs and disbursements herein taxed at $—.

It is further ordered, adjudged and decreed that Anton Hahn is the owner in fee simple, and entitled to and is in the exclusive possession of the portion of said right of way within the boundaries of the north half of the northeast quarter of section 34, township 26 north, range 45 east of the Willamette meridian, in the county of Spokane and State of Washington, lying on the north side of the

main line of the plaintiff's railroad track, as the same runs through said lands, north of a line on the north side of said track and parallel therewith and at a uniform distance of seventy-five feet from the center of said track and that portion lying south of said track south of a line running parallel with said track on the south side thereof at a uniform distance of seventy-five feet from the center of said track.

It is further ordered, adjudged and decreed that the title of said defendants be, and it is hereby quieted as against plaintiff.

It is further ordered, adjudged and decreed that defendant
135 have and recover of and from plaintiff his costs and disbursements herein taxed at $—.

It is further ordered, adjudged and decreed, that the Northwestern and Pacific Hypotheekbank is the owner in fee simple, and is entitled to and is in the exclusive possession of that portion of said right of way within the boundaries of what are usually designated and described as lots 6 and 7 in block 1 of Saunders' addition to the city of Spokane Falls (now Spokane), and more particularly described as follows:—Beginning at a point where the south line of the aforesaid right of way intersects the east boundary line of said lot seven (7), running thence north along the east boundary line of said lot 7, eighty and 60/100 feet, more or less, to the northeast corner of said lot 7; thence west on the north boundary line of said lots seven and six to the northwest corner of said lot six, a distance of fifty feet, more or less; thence south along the west boundary line of said lot six, one hundred three and 84/100 feet, more or less, to a point where the south boundary line of said right of way intersects the west boundary line of said lot six; thence in an easterly direction along the south boundary line of said right of way to the place of beginning.

It is further adjudged and decreed that defendants Henry Willey and Sarah Willey are in the actual occupancy of the premises last above described as tenants of the Northwestern and Pacific Hypotheekbank.

It is further ordered, adjudged and decreed that the title of said defendants be and it is hereby quieted as against plaintiff.

It is further ordered, adjudged and decreed that said defendants do have and recover of and from plaintiffs its and their costs and disbursements herein, taxed at $—.

It is further ordered, adjudged and decreed that the heirs of James Laughlin, deceased, are the owners in fee simple and John Kildea as administrator of the estate of the — James Laughlin, deceased, is entitled to, and is in the exclusive possession, of that portion of said right of way lying within the boundaries of the southwest quarter of the northeast quarter, and the southeast quarter of the northwest quarter, and lots three and five of section six,
136 township twenty-five north, range forty-five east of the Willamette meridian, in Spokane county, State of Washington, and being not less than fifty feet distance at all points from the

nearest point in the center of the main line railroad track of said plaintiff as it is constructed through said section six.

It is further adjudged and decreed that defendants Michael Blessing and Mary Blessing are in the actual occupancy of the premises last above described, as tenants of John Kildea, administrator.

It is further ordered, adjudged and decreed that the title of said defendants be, and it is hereby, quieted as against plaintiff.

It is further ordered, adjudged and decreed that said defendants do have and recover of and from plaintiff their costs and disbursements herein taxed at $17.00.

It is further ordered, adjudged and decreed, that Claribel Kaufman and Isaac S. Kaufman are the owners in fee simple (subject only to the rights of the Equitable Trust Company, mortgagee, impleaded herein as the "Jennings Trust Company") and entitled to, and are in the exclusive possession of that portion of said right of way lying within the boundaries of what is usually designated and described as lot three in block one of Saunders' addition to the city of Spokane Falls (now Spokane), and more particularly described as follows:—Beginning at a point where the south line of said right of way intersects the east boundary line of said lot three; running thence north along the east boundary line of said lot three, one hundred twenty-seven and 8/100 feet, more or less, to the northeast corner of said lot; thence west along the north boundary line of said lot, twenty-five feet, more or less, to the northwest corner of said lot; thence south along the west boundary line of said lot, one hundred and thirty-eight and 70/100 feet, more or less, to a point where the said south boundary line of said right of way intersects the west boundary line of said lot; thence in an easterly direction along the said south boundary line of said right of way to the point of beginning.

It is further ordered, adjudged and decreed that the title of said defendants be, and it is hereby quieted as against plaintiff.

It is further ordered, adjudged and decreed that said de-
137 fendants do have and recover of and from plaintiff their and its costs and disbursements herein, taxed at $—.

It is further ordered, adjudged and decreed, that Jennie McKenzie is the owner in fee simple and entitled to and is in the possession of that portion of said right of way within the boundaries of what is usually designated and described as lots one and two in block one of Saunders' addition to the city of Spokane Falls (now Spokane), and more particularly described as follows:—Beginning at a point where the south line of said right of way intersects the east boundary line of said lot two; running thence north along the east boundary of said lot two, one hundred thirty-eight and 70/100 feet, more or less, to the northeast corner of said lot two; thence west along the north boundary line of said lot two and the north boundary line of said lot one, fifty feet, more or less, to the northwest corner of said lot one; thence south along the west

line of said lot one, one hundred sixty and 55/100 feet, more or less, to a point where the south boundary line of said right of way intersects the west boundary line of said lot one; thence in an easterly direction along the south boundary line of said right of way to the point of beginning; and that defendant James McKenzie has only such rights in the last above described property as he may be entitled to by virtue of being the husband of said Jennie McKenzie.

It is further ordered, adjudged and decreed that the title of said defendants be, and it is hereby quieted as against plaintiff.

It is further ordered and adjudged that said defendants do have and recover of and from plaintiff their costs and disbursements herein taxed at $—.

Done in open court this 15 day of May 1900.

LEANDER H. PRATHER, *Judge.*

Received copy of the foregoing this 19th day of April, 1900.

JAMES DAWSON,
By S. G. ALLEN.
ALEX. M. WINSTON,
By FRED W. THURSTON, *Cl'k.*
J. E. BORNAUGH,
Per W. STRONG.
BLAKE & POST.
HENLEY, KELLAM & LINDSLEY.
SAML. R. STERN.
SCOTT & ROSSLOW.
H. L. KELLAM.

Filed May 15, 1900, at 9:35 o'clock a. m.

JAMES A. DRAIN, *Clerk.*
J. O. PETERSON, *Deputy.*

138 Superior Court Journal. (63.)

TUESDAY, *the 15th Day of May*, 1900.

Court convened at 9 o'clock a. m.
Present: The Honorable Leander H. Prather, judge presiding.

NORTHERN PACIFIC RAILWAY CO., Pl'ff,
vs.
WM. S. ELY ET AL., Def'ts. } 13258.

Decree and order overruling motion for new trial signed.

13258.

In the Superior Court of the State of Washington for Spokane County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
WILLIAM S. ELY ET AL., Defendants. } No. 13258.

Judgment and decree in the above entitled action having been rendered, entered and filed on this 15th day of May, 1900; at the time said judgment and decree was rendered, and thereupon, and thereafter, in open court, plaintiff, The Northern Pacific Railway Company gave notice of appeal and did appeal to the supreme court of the State of Washington from all that part of said judgment and decree which was and is against said plaintiff and in favor of defendants Gustave Reith, Marvin Arnold, Julia Arnold, Covert August, Pauline E. August, John J. Browne, Anna W. Browne, Z. Colby, Sophia Colby, William S. Ely, Joseph B. Goodner, Sallie Goodner, Eugene Germond, Claudia A. Germond, Jacon Loerchter, Olaf Hammerlund, Carl J. Berggren, W. F. Mitchem, Ida Mitchem, James Albi, William Albi, Anotn Hahn, Northwestern & Pacific Hypotheekbank, Henry Willey, Sarah Willey, John Kildea as administrator of the estate of James Laughlin, deceased, Michael Blessing, Mary Blessing, Claribel Kaufman, Isaac F. Kaufman, Equitable Trust Company (impleaded as the Jennings Trust Company) Jennie McKenzie and James McKenzie, or any or either of them, and each and every portion of said judgment, and decree which was or is against said plaintiff and in favor of said defendants, or any or either of them, which judgment is for costs against plaintiff and in favor of said defendants, and each and every of them, respectively and which
139 said judgment and decree adjudges and decrees that said defendants and each and all of them are, respectively, in possession of and own certain land and premises in controversy in said action, and described in said judgment and decree; and said plaintiff did then and there in open court, give notice of appeal from all said part and portions, and each and every of said portions of said judgment and decree against and adverse to said plaintiff and in favor of said defendants as aforesaid, to the said supreme court; and thereupon the judge directed the clerk to make an entry of such notice of appeal in the journal of the court, which was accordingly done. And the court fixes the amount of the bond on appeal (or appeal bond) herein at the sum of one thousand dollars, and fixes the supersedeas bond to stay proceedings, as to defendants John J. Browne and Anna W. Browne at the sum of one thousand dollars. Done in open court this 15th day of May, 1900.

LEANDER H. PRATHER, *Judge.*

140 In the Superior Court of the State of Washington in and for Spokane County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff, *vs.* WILLIAM S. ELY ET AL., Defendants. } No. 13258. Supersedeas Bond on Appeal.

Know all men by these presents: That we, Northern Pacific Railway Company, as principal, and F. H. Mason and Henry M. Richards as sureties are held and firmly bound unto John J. Browne and Anna W. Browne, defendants and respondents in the above entitled action, in the sum of one thousand dollars ($1,000) for the payment of which well and truly to be made, we hereby bind ourselves and our and each of our successors, representatives, heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 16th day of May, 1900.

The condition of the above obligation is such that, whereas the above named plaintiff, Northern Pacific Railway Company, has appealed to the supreme court of the State of Washington from all that part of that certain final judgment and decree made, rendered, entered and filed in the above entitled action by the above entitled superior court on the 15th day of May 1900, which was and is against said plaintiff and in favor of said above named defendants John J. Browne and Anna W. Browne, or either of them, and each and every portion of said judgment and decree which was or is against said plaintiff and in favor of said defendants or either of them, which judgment is for costs against said plaintiff and in favor of said defendants, and which said judgment and decree adjudges and decrees that said defendants, John J. Browne and Anna W. Browne, are in possession & entitled to possession of and own certain lands and premises in controversy in said action, and described in said final judgment and decree; and whereas said plaintiff and appellant desires a stay of proceedings herein upon each and every part and all of said final judgment and decree which is against said plaintiff and in favor of said defendants, John J. Browne and Anna

W. Browne, during the pendency of said appeal and the said
141 superior court has fixed the amount of such stay bond as to said portion of said final judgment and decree at the said sum of one thousand dollars.

Now therefore if the said plaintiff and appellant Northern Pacific Railway Company shall and will satisfy and perform all and each and every part of said final judgment and decree so appealed from which is against said plaintiff and appellant and in favor of said defendants and respondents, John J. Browne and Anna W. Browne, in case it shall be affirmed, and any judgment or order which the said supreme court may render or make, or ordered to be rendered

or made by said superior court, and shall and will pay all rents of and damages or damage to property accruing during the pendency of said appeal, out of the possession of which said defendants and respondents or either of them, shall or may be kept by reason of said appeal, then and in that event this obligation shall become and be null and void; otherwise to be and remain in full force and effect.

NORTHERN PACIFIC RAILWAY COMPANY, [SEAL.]
By STEPHENS & BUNN, *Its Attorneys.*
HENRY M. RICHARDS. [SEAL.]
F. H. MASON. [SEAL.]

STATE OF WASHINGTON, } ss:
County of Spokane, }

F. H. Mason and Henry M. Richards being first duly sworn for himself upon oath deposes and says:

I am one of the sureties upon and who executed the foregoing obligation; I am a resident of Spokane county, State of Washington, and am worth the sum of one thousand dollars ($1,000), the sum specified in said obligation as the penalty thereof, over and above all debts and liabilities, in separate property within said Spokane county, State of Washington, and exclusive of property exempt from execution.

HENRY M. RICHARDS.
F. H. MASON.

Subscribed and sworn to before me this 16th day of May A. D. 1900.

[SEAL.] E. T. WHITE,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

Filed May 16 1900 at 2:15 o'clock p. m.
JAMES A. DRAIN, *Clerk.*
FRED W. LUELLING, *Deputy.*

142 In the Superior Court of the State of Washington in and for Spokane County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff, vs. WILLIAM S. ELY ET AL., Defendants. } No. 13258. Bond for Costs on Appeal.

Know all men by these presents: That we, Northern Pacific Railway Company, as principal, and F. H. Mason and Henry M. Rich-

ards, as sureties are held and firmly bound unto William S. Ely, Gustave Reith, Marvin Arnold, Julia Arnold, Covert August, Pauline E. August, John J. Browne, Anna W. Browne, Z. Colby, Sophia Colby, Joseph B. Goodner, Sallie Goodner, Eugene Germond, Claudie A. Germond, Jacob Loertcher, Olof Hammerlund, Carl J. Berggren, W. F. Mitchem, Ida Mitchem, James Albi, William Albi, Anton Hahn, Northwestern and Pacific Hypotheekbank, Henry Willey, Sarah Willey, John Kildea, as administrator of the estate of James Laughlin, deceased, Michael Blessing, Mary Blessing, Claribel Kaufman, Isaac Kaufman, Equitable Trust Company, (impleaded as the Jennings Trust Company) Jennie McKenzie and James McKenzie, defendants and respondents in the above entitled action, in the sum of one thousand dollars ($1000) for the payment of which well and truly to be made, we hereby bind ourselves, and our and each of our successors, representatives, heirs, executors and administrators ointly and severally, firmly by these presents.

Sealed with our seals and dated this 16th day of May A. D. 1900.

The condition of the above obligation is such that, whereas the above named plaintiff Northern Pacific Railway Company, has appealed to the supreme court of the State of Washington, from all that part of that certain final judgment and decree made, rendered and entered and filed in the above-entitled action by the above entitled superior court on the 15th day of May, 1900, which was and is against said plaintiff and in favor of said above named defendants, William S. Ely, Gustave Reith, Marvin Arnold, Julia Arnold, Covert August, Pauline E. August, John J. Browne, Anna W. Browne, Z. Colby, Sophia Colby, Joseph B. Goodner, Sallie
143 Goodner, Eugene Germond, Claudie A. Germond, Jacob Loertcher, Olof Hammerlund, Carl J. Berggren, W. F. Mitchem, Ida Mitchem, James Albi, William Albi, Anton Hahn, Northwestern and Pacific Hypotheekbank, Henry Willey, Sarah Willey, John Kildea, as administrator of the estate of James Laughlin, deceased, Michael Blessing, Mary Blessing, Claribel Kaufman, Isaac S. Kaufman, Equitable Trust Company (impleaded as the Jennings Trust Company), Jennie McKenzie and James McKenzie, or any or either of them, and each and every portion of said judgment and decree which was or is against said plaintiff and in favor of said defendants, or any or either of them, which judgment is for -osts against plaintiff and in favor of said defendants, and each and every of them, respectively, and which said judgment and decree adjudges and decrees that said defendants and each and all of them are, respectively, in possession of and own certain land and premises in controversy in said action, and described in said final judgment and decree.

Now therefore, if the above bounden Northern Pacific Railway Company shall and will pay all costs and damages that may be awarded against it on the said appeal, or on a dismissal thereof, not exceeding the sum of one thousand dollars (the sum fixed by order of the above-named superior court for bond for costs upon appeal

herein) then and in that event this obligation shall become null and void, otherwise to be and remain in full force, virtue and effect.

NORTHERN PACIFIC RAILWAY COMPANY, [SEAL.]
By STEPHENS & BUNN, *Its Attorneys.*
HENRY M. RICHARDS. [SEAL.]
F. H. MASON. [SEAL.]

STATE OF WASHINGTON, } ss:
County of Spokane, }

F. H. Mason and Henry M. Richards, being first duly sworn, each for himself deposes and says: I am one of the sureties upon and who executed the foregoing obligation; I am a resident of Spokane county, State of Washington, and am worth the sum of one thousand dollars ($1,000) the sum specified in the foregoing obligation as the penalty thereof, over and above all debts and liabilities, in separate property within said Spokane county, State of Washington, exclusive of property exempt from execution.

HENRY M. RICHARDS.
F. H. MASON.

Subscribed and sworn to before me this 16th day of May, A. D. 1900.

[NOTARIAL SEAL.] E. T. WHITE,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

Filed May 16, 1900 at 2:15 o'clock p. m.
JAMES A. DRAIN, *Clerk.*
FRED W. LUELLING, *Deputy.*

144 In the Superior Court of the State of Washington in and for the County of Spokane.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff, *vs.* WILLIAM S. ELY ET AL., Defendants. } No. 13258. Order.

In the matter of the application of the plaintiff, Northern Pacific Railway Company, to the court, and judge thereof before whom the cause is pending and was tried, to settle and certify the bill of exceptions (which proposed bill of exceptions was duly filed and served by plaintiff and amendments thereto duly proposed and filed by defendants) coming on regularly to be heard upon written notice duly and regularly served and filed, specifying the time and place,

not less than three, nor more than ten days after service of such notice, to settle and certify the bill of exceptions herein, and it appearing to the court that said application cannot be heard at this time by the court, or at any time during vacation of the court (which vacation of the court is July and August) and that the court will be unable to hear or determine said application or settle or certify the bill of exceptions herein at this time, or at any time prior to the 3rd day of September, 1900.

It is therefore considered by the court that the hearing of said application and the settling and certifying of said bill of exceptions herein be, and the same is hereby adjourned until and to 9:30 a. m. on the 3rd day of September, 1900, at the court room of the undersigned judge to wit, the east court room on the second floor of the court house in the city and county of Spokane, State of Washington.

It further appearing to the court that the time for preparing serving and filing brief of appellant and plaintiff will expire before the bill of exceptions can be settled and certified by the court, and good cause being shown,

It is hereby further ordered that the time for serving and filing brief of appellant and plaintiff be, and the same is hereby extended to and for thirty days after the date of settling and certifying
145 the bill of exceptions herein, and that defendants and respondents shall have the time provided by law after service of brief of plaintiff and appellant.

Upon and for good cause being shown, it is hereby ordered that plaintiff and appellant shall have thirty days after date of settling and certifying bill of exceptions herein, within which to file with and send up to the supreme court the record herein.

Done in open court and in the presence of counsel for plaintiff and defendants appearing in this action, said counsel appearing in open court and not objecting to the orders of the court herein made, and dated this 9th day of July, 1900.

LEANDER H. PRATHER, *Judge.*

Filed Jul- 10 1900 at 9:45 o'clock a. m.

JAMES A. DRAIN, *Clerk.*
WALTER L. McCULLOM, JR., *Deputy.*

THE STATE OF WASHINGTON, } ss:
County of Spokane, }

NORTHERN PACIFIC RAILWAY CO., Pl'ff, }
vs. } No. 13258.
WILLIAM S. ELY ET AL., Def'ts. }

Certificate.

I, James A. Drain, clerk of the superior court of the State of Washington, in and for the county of Spokane, do hereby certify

that the above and foregoing is a full, true and correct transcript of so much of the record and files in the above entitled cause as I have been directed by the appellant to transmit to the supreme court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 18th day of July, A. D. 1900.

[SEAL.]

JAMES A. DRAIN, *Clerk.*
J. O. PETERSON, *Deputy.*

146 In the Superior Court of the State of Washington in and for the County of Spokane.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
WM. S. ELY ET AL., Defendants.

No. 13258. Bill of Exceptions.

Be it remembered, that the issues raised by the pleadings, to-wit, the amended complaint of plaintiff, and answers and amended answers of the following named defendants: Marvin Arnold and Julia Arnold, Covert August and Pauline E. August, Michael Blessing and Mary Blessing, John J. Browne and Anna W. Browne, Z. Colby and Sophia Colby, Equitable Trust Company, (impleaded as Jennings Trust Company) Joseph B. Goodner and Sallie Goodner, Eugene G. Germond and Claudia A. Germond, Anton Hahn, I. S. Kaufman and Claribel Kaufman, Jacob Loertcher, James McKenzie, Jennie McKenzie, Northwestern and Pacific Hypotheekbank, Gustave Reith and Wm. S. Ely; and the replies of plaintiff to the answers and amended answers of defendants—came on regularly for hearing and trials on the separate issues made by the said several defendants, (such separate trials having been allowed by the court upon the application of said defendants, respectively) before the court above named and a jury duly empaneled, the Honorable Leander H. Prather presiding.

That plaintiff and said defendants appeared by their respective counsel and the following proceedings were had and done, to-wit:

147 Each and all of said defendants by their respective counsel, in open court admitted, as alleged in the amended complaint of plaintiff herein, that the Northern Pacific Railroad Company was created a corporation by an act of Congress approved July 2, 1864, entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound, on the Pacific coast, by the northern route.

That said act required an acceptance of its terms and conditions, which acceptance was duly made and given by said company; that in accordance with the provisions of said act of Congress said Northern Pacific Railroad Company located and constructed its said road

between the points described in said act and filed its map of definite location of that portion of its line crossing the premises in controversy, in the office of the Commissioner of the General Land Office on October 4th, 1880, after having been approved by the Secretary of the Interior; that said railroad was duly constructed over the premises in controversy upon the line defined by said map of definite location.

That the premises in controversy, upon and over which said road was constructed, were, on July 2, 1864, public lands of the United States, not reserved, and free from preëmption or other claims or rights; that plaintiff is a corporation, and was a corporation at all the times herein mentioned, incorporated under the laws of the State of Wisconsin.

Thereupon plaintiff offered evidence (which the court admitted) showing that it had succeeded to the right and title of said Northern Pacific Railroad Company in and to the right of way granted by Congress over the premises in controversy. To this evidence Germond and Loertcher objected upon the ground that the Northern Pacific Railroad Company, from whom the plaintiff claims title by conveyance had no power or authority to convey or assign
148 its rights, franchises or right of way to this plaintiff, or to any other person or corporation, and, second, the mortgage or mortgages under proceedings for the foreclosure of which plaintiff claims title, were unauthorized, the said Northern Pacific Railroad Company having no authority to make the same, the only authority of the said Northern Pacific Railroad Company to make or create any mortgage upon the property involved in this action, or any part of it, having been exhausted prior to the making of any mortgage under the foreclosure of which this plaintiff claims title, these defendants, nor either of them, being a party to said foreclosure proceedings are bound thereby, which objection the court overruled, to which ruling these defendants objected and exception was allowed.

Plaintiff further offered evidence that the whole of the premises in controversy was situated within two hundred feet of the line of said railroad so located and constructed, and showing that from the time of the construction of said road, to-wit, 1881, to the date of the trials, said road had been continuously and daily operated by the said Northern Pacific Railroad Company, the receivers thereof, and the plaintiff herein; that plaintiff and its predecessors in interest have paid all taxes and assessments levied or assessed against them for said road bed or right of way, but the evidence does not show the width of the said right of way so assessed.

Thereupon evidence was offered by Gustave Reith, one of the defendants in said action, tending to show that for a period of more than ten years next preceding the commencement of this action, he and his grantors had actually, continuously, openly and adversely occupied, under claim of title thereto, the following described premises, to-wit: all that portion of the said right of way lying within

the boundaries of what are usually known, designated and
149 described as lots 8 and 9 in block 1 of Saunders' addition to the city of Spokane Falls (now Spokane), and more particularly described as follows, to-wit: Beginning at a point where the south line of said right of way intersects the east boundary line of said lot nine; running thence north along the east boundary line of said lot nine, fifty seven and 36/100 feet, more or less, to the northeast corner of said lot nine; thence west along the north boundary line of said lot nine and the north boundary line of said lot eight, fifty feet, more or less, to the northwest corner of said lot eight, eighty and 60/100 feet, more or less, to a point where the south boundary line of said right of way intersects the west boundary line of said lot eight; thence in an easterly direction along the south boundary line of said right-of way to the place of beginning; and had made valuable and lasting improvements thereon with the knowledge of and without any objections by the plaintiff or its predecessors in interest, and had paid all taxes and assessments levied upon said premises last above described (which premises are within two hundred feet of the line of said railroad as located and constructed as aforesaid.).

Defendants Covert August and Pauline E. August offered evidence tending to show that for a period of more than ten years next preceding the commencement of this action they and their grantors had actually, openly, continuously and adversely occupied, under claim of title thereto, the following described premises, to-wit: all that portion of said right of way lying within the boundaries of the north half of the northwest quarter, the southeast quarter of the northwest quarter, and the northwest quarter of the northeast quarter of section 28, township 23 north, of range 41 east of the Willamette meridian, and being distant not less than fifty feet at all points from the nearest point in the center of the main line railroad track of said plaintiff as it is constructed through said section
150 28; that they had made valuable and lasting improvements thereon with the knowledge of and without any objections by the plaintiff or its predecessors in interest, and had paid all taxes and assessments levied upon said premises last above described (which premises are within two hundred feet of the line of said railroad as located and constructed as aforesaid).

Defendants Z. Colby and Sophia Colby introduced evidence proving that for a period of more than ten years next preceeding the commencement of this action they had been in the actual, open, continuous, notorious and adverse possession, under color and claim of title, and a claim of absolute ownership of the following described premises, to-wit: all that portion of said right of way lying within the boundaries of the northwest quarter of section 14, township 25 north, range 43 east of the Willamette meridian, in the State of Washington, and lying on the north side of the main line railroad track of plaintiff, and the south line of which strip is parallel with said track and one hundred and sixty feet distant at all points from

the center of said track as it is constructed through said section 14, and had made valuable and lasting improvements thereon with the knowledge of and without any objections by the plaintiff or its predecessors in interest, and had paid all taxes and assessments levied upon said premises last above described (which premises are within two hundred feet of the line of said railroad as located and constructed as aforesaid).

That said right of way is located on the northwest quarter of section fourteen (14) in township twenty-five (25) north, range forty-three (43), E. W. M. in Spokane county, State of Washington. That the said defendant, Z. Colby, being a citizen of the United States in the spring of 1883 entered said lands under the pre-emption laws of the United States as a pre-emption, and subsequently in 1886 commuted the same to a homestead entry under the homestead laws of the United States, and subsequently, in the year 1891, made
151 final proof thereof, paid the necessary fees and received from the receiver of the proper United States land office the final receipt, and thereafter, on November 15th, 1892, the patent was duly issued to him by the United States Government under said homestead entry. That said patent made no exception or reservation of said right of way for said Northern Pacific Railway Company, and made no mention whatever of said right of way. That the plaintiff and its predecessor, the Northern Pacific Railway Company, have never at any time used nor attempted to use for the railroad or any other purpose whatsoever that portion of said premises within plaintiff's alleged right of way, consisting of the strip of land lying on the north side of its track, parallel therewith as hereinbefore described and being in possession of said defendants; nor has plaintiff or its predecessors ever objected to said defendants' claim of ownership until the commencement of this action.

Defendant Wm. S. Ely offered evidence tending to show that for a period of more than ten years next preceding the commencement of this action he and his grantors had actually, openly, continuously and adversely occupied, under claim of title thereto, the following described premises, to wit: all that portion of said right of way lying within the boundaries of what is usually designated and described as lot 1 of block 3 of Havermale's addition to Spokane Falls (now Spokane), Washington, and had made valuable and lasting improvements thereon with the knowledge of and without any objections by the plaintiff or its predecessors in interest, and had paid all taxes and assessments levied upon said premises last above described (which premises are within two hundred feet of the line of said railroad as located and constructed as aforesaid.

And that for upwards of ten years prior to the purchase by the said William S. Ely of the said lot 1, block 3, of Havermale's addition to Spokane Falls, Washington, prior owners of said
152 property had paid taxes and assessments upon said property, had used and occupied the same, and made valuable improvements upon it by erecting buildings, and putting fences and

sidewalks around the same, and that the streets known as Sprague avenue and Division street were used by the public for upwards of ten years prior to the purchase of the said property by the said Ely, and that both of said streets were open to the public and were main thoroughfares, and used as such, and all the foregoing was known to the plaintiff and its predecessor, and that no objection was ever made to the occupancy, improvement or use of the said property as aforesaid; and that upwards of fifteen years prior to the purchase of said property by the defendant, Ely, a patent to the said lot above referred to was issued to Samuel G. Havermale, who platted a large tract of land, which included the said lot, and filed said plat in the auditor's office of Spokane county, after having laid out in lots and blocks, streets and alleys, the said property thus platted. That a patent issued to said Havermale for the property so platted as Havermale's addition, and he sold lot 1, block 3 by warranty deed, and that for upwards of ten years prior to the purchase of the same by the defendant Ely and others by mesne and other conveyances of paper title, have sold, and defendants and others purchased said lot in good faith and for a valuable consideration, with the knowledge of, and without objection from, the plaintiff or its predecessors in interest.

That public improvements, such as grading and sewers were built and maintained upon said premises, for all of which said defendant Ely, and others who acquired said property by purchase and for a valuable consideration and in good faith, had paid for, with the knowledge of, and without objection from, the plaintiff, or its predecessors.

153 That the defendant, William S. Ely, offered testimony to show that the Northern Pacific Railroad Company had agreed with one Alice Houghton, who claimed to be the owner of said lot 1, block 3, Havermale's addition, to waive any claim to any portion of said lot and to give a quit claim deed of any part of the so called right of way included within the limits of said lot 1, block 3, as platted and appearing upon the plat of said Havermale's addition, in consideration of certain services performed by the said Alice Houghton for the said railroad company aforesaid, and that in default of so doing, the said Alice Houghton would receive the sum of $1,000.00 in payment of said services. That said services were performed; that the said railroad or railway company never paid the sum of $1,000.00 nor gave the said quit claim deed.

That defendants Joseph B. Goodner and Sallie Goodner introduced evidence proving that for a period of more than ten years next preceding the commencement of this action they had been in the actual, open, continuous, notorious and adverse possession, under color and claim of title, and a claim of absolute ownership of the following described premises, to-wit: all that portion of said right of way described as two certain strips of land, each one hundred and fifty feet wide, one lying on the south side and the other on the north side of the plaintiff's railroad track, and running parallel with

the same for the full distance that said track runs through the southeast quarter of section thirty-two, township twenty-six north, of range forty-five east of the Willamette meridian, in the county of Spokane, State of Washington, the north line of one of said strips running parallel with said track, and at a uniform distance of fifty feet therefrom; and the south line of the other of said strips running parallel with said track and at a uniform distance of fifty feet therefrom; that they had made valuable and lasting improvements thereon with the knowledge of and without any objections by the plaintiff or its predecessors in interest, and had paid all taxes and assessments levied upon said premises last above described (which
154 premises are within two hundred feet of the line of said railroad as located and constructed as aforesaid).

That said right of way is located upon the southeast quarter of section thirty-two (32) in township twenty-six (26) north, of range forty-five (45) east of the Willamette meridian; that in the year 1880 defendant Joseph B. Goodner, a citizen of the United States and the head of a family, entered said quarter section under the United States homestead laws as a homestead, filing a proper application therefor, and thereafter, and on November 16th, 1883, made final proof of said lands, paid the necessary fees, received from the receiver of the land office a final receipt, and thereafter and on August 21st, 1884, a patent of said lands was issued to him by the United States Government under said homestead entry, which patent made no exception or reservation for or on behalf of said Northern Pacific Railroad Company, or any mention of said alleged right of way whatsoever; that said company or the plaintiff have never used the same or made any attempt to use the same for railroad purposes, nor have they, or either of them, ever objected to or dissented from the said defendants' claim of ownership thereof until the commencement of this action.

Defendants Eugens G. Germond, Claudia A. Germond and Jacob Loertcher offered evidence tending to show that for a period of more than ten years next preceding the commencement of this action they and their grantors had actually, openly, continuously and adversely occupied, under claim of title thereto, the following described premises, to-wit: all that portion of said right of way within the boundaries of what are usually designated and described as lots 10, 11 and 12 in block 1 of Saunders' addition to the city of Spokane Falls (now Spokane); that they had made valuable and lasting improvements thereon with the knowledge of and without any
155 objections by the plaintiff or its predecessors in interest, and had paid all taxes and assessments levied upon said premises last above described (which premises are within two hundred feet of the line of said railroad as located and constructed as aforesaid).

Defendant Anton Hahn introduced evidence showing that since 1881 and for a period of more than sixteen years next preceding the commencement of this action he had been in actual, open, contin-

nous and adverse possession, under claim and color of title and a claim of absolute ownership, of the following described premises, to-wit: all that portion of said right of way within the boundaries of the north half of the northeast quarter and the north half of the northwest quarter of section thirty-four, township 26 north, range 45 east of the Willamette meridian, in the county of Spokane and State of Washington, lying on the north side of plaintiff's railroad track, as the same runs through said lands, north of a line on the north side of said track and parallel therewith and at a uniform distance of seventy five feet from the center of said track, and that portion lying south of said track south of a line running parallel with said track and on the south side thereof at a uniform distance of seventy five feet from the center of said track; that he had made valuable and lasting improvements thereon with the knowledge of and without any objections by the plaintiff or its predecessors in interest, and had paid all taxes and assessments levied on said premises last above described (which premises are within two hundred feet of the line of said railroad as located and constructed as aforesaid).

That said right of way is located on the north half of the northeast quarter and the north half of the northwest quarter of section thirty-four (34), township twenty-six (26) north, range forty-five (45) east of the Willamette meridian in Spokane county, State of Washington. That said defendent Hahn being a citizen of the United States in the summer of 1881 entered said lands under the
156 United States homestead laws as a homestead, filed a proper application therefor. That on November 30th, 1886, he made final proof thereon, paid the necessary fees and received from the receiver of the proper United States land office a final receipt and thereafter on May 28th, 1888, a patent was duly issued to him by the United States under said homestead entry; that said patent made no exception or reservation of said right of way for said Northern Pacific Railroad Company, or any one and made no mention whatever of said right of way. That the plaintiff and its predecessor the Northern Pacific Railroad Company have never at any time used, nor attempted to use for railroad purposes or any other purpose whatsoever that portion of said premises within plaintiff's alleged right of way consisting of the two (2) strips of land lying on either side of its railroad track parallel therewith as hereinbefore described and being in possession of the defendant; nor has said plaintiff, or its predecessor ever objected to said defendant Hahn's claim of ownership until about the time of the commencement of this action; and that in 1888 the Northern Pacific Railroad Company erected cattle guards where its track enters and leaves said defendants' lands, and constructed wing fences extending fifty feet on either side of said cattle guards, to which defendant joined his fences, and in 1898 said plaintiff fenced in its road bed and part of said right of way by constructing fences on either side of, parallel with and seventy-five feet distant from, the center of its track, through the en-

tire distance that said track runs over said lands; that the foregoing evidence tended to show said plaintiff and its predecessors abandoned all that portion of its right of way included within said strips of land.

Defendant Northwestern and Pacific Hypotheekbank introduced evidence proving that for a period of more than ten years
157 next preceding the commencement of this action it and its grantors had been in the actual, open, continuous, notorious and adverse possession under color and claim of title and a claim of absolute owneaship of the following described premises, to-wit: all that portion of said right of way within the boundaries of what are usually designated and described as lots six and seven, in block one of Saunders' addition to the city of Spokane Falls (now Spokane), and more particularly described as follows: Beginning at a point where the south line of the aforesaid right of way intersects the east boundary line of said lot seven, running thence north along the east boundary line of said lot seven, eighty and 60/100 feet, more of less, to the northeast corner of said lot seven; thence west on the north boundary line of said lots six and seven to the northwest corner of said lot six, a distance of fifty feet, more or less; thence south along the west boundary line of said lot six, one hundred three and 84/100 feet, more or less, to a point where the south boundary line of said right of way intersects the west boundary line of said lot six; thence in an easterly direction along the south boundary line of said right of way to the place of beginning; that they have made valuable and lasting improvements thereon, with the knowledge of, and without objections by, the plaintiff, or its predecessors in interest, and have paid all taxes and assessments levied upon said premises last above described (which premises are within two hundred feet of the line of said railroad as located and constructed as aforesaid).

That all of said lots six and seven in said block one of said Saunders' addition of the city of Spokane Falls (now Spokane) have been assessed for the purpose of State, county and city taxation for more than fifteen years before the commencement of this action, all of which taxes have been annually paid by said defendant
158 and its grantors; that said two lots are bounded on the north by Sprague avenue, a public thoroughfare in the city of Spokane, running east and west and at nearly right angles across the right of way and track of plaintiff; that said lots six and seven are respectively twenty-five feet in width and one hundred and fifty-five feet in length; that the nearest point on said lots from the railroad tracks of said Northern Pacific Railway Company is more than one hundred feet distant therefrom; that said lots were several years before the commencement of this action assessed by the city of Spokane for the grading of said Sprague avenue, and said assessment was paid by defendant and its grantors; that said block one of said Saunders' addition is located on the northwest quarter of the northwest quarter of section twenty (20), township twenty-five (25) north, of range forty-three (43) E. W. M.; that said land on May 12th,

1879 was entered as a homestead by one Henry T. Cowley, and on February 3rd, 1883, he made final proof of said land, paid the necessary and proper fees, and obtained from the receiver of the land office a proper receipt therefor; and on December 30th, 1884, a patent was issued to him by the United States Government for said lands, and no exception, reservation or mention was made therein whatsoever of said alleged right of way of the Northern Pacific Railway Company; that said lands were conveyed by said Cowley to one Frank R. Moore by deed dated March 15, 1883 who platted the same as an addition to the city of Spokane Falls (now Spokane), under the name of "Saunders' addition" on July 20th, 1883, filing said plat at said time with the auditor of Spokane county; that one of the streets so named and dedicated to the city of Spokane in said plat was said Sprague avenue; that said Sprague avenue has been used as a public th-roughfare ever since, crossing the tracks of said railroad company; that this defendant obtained paper title to said lots by deeds through said Frank R. Moore, and
159 his grantees; that said Northern Pacific Railway Company or its predecessor in interest has never used the same or made any attempt to use the same for railroad purposes; nor have they, or either of them ever objected to or dissented from defendant's claim of ownership thereof until the commencement of this action; that the said evidence and other evidence as to similar facts as to other lands in said block, introduced on behalf of said defendant, also tended to show that the plaintiff and its predecessor, the Northern Pacific Railroad Company, have at all times for more than ten years before the commencement of this action abandoned all that portion of its right of way as granted by said act of Congress included within lots six (6) and seven (7) aforesaid and block one (1) of said Saunders' addition to Spokane Falls (now Spokane).

Defendant John Kildea, as the administrator of the estate of James Laughlin, deceased, offered evidence tending to show that for a period of more than ten years next preceding the commencement of this action he, as administrator, and said deceased, had actually, openly, continuously and adversely occupied, under claim of title thereto, the following described premises, to-wit: all that portion of said right of way lying within the boundaries of the southwest quarter of the northeast quarter, and the southeast quarter of the northwest quarter, and lots three and five, of section six, township twenty-five north, range forty-five east of the Willamette meridian, in Spokane county, State of Washington, and being not less than fifty feet distant at all points from the nearest point in the center of the main line railroad track of said plaintiff as it is constructed through said section six; that they had made valuable and lasting improvements thereon, with the knowledge of, and without objections by, the plaintiff or its predecessors in interest, and had paid all taxes and assessments levied upon said premises last above de-
160 scribed (which premises are within two hundred feet of the line of said railroad as located and constructed as aforesaid.

Defendants Claribel Kaufman and Isaac S. Kaufman introduced evidence proving that for a period of more than ten years next preceding the commencement of this action they have been in the actual, open, notorious, continuous and adverse possession, under color and claim of title, and a claim of absolute ownership, of the following described premises, to-wit: all that portion of said right of way lying within the boundaries of what is usually designated and described as lot three, in block one, of Saunders' addition to the city of Spokane Falls (now Spokane), and more particularly described as follows: Beginning at a point where the south line of said right of way intersects the east boundary line of said lot three; running thence north along the east boundary line of said lot three one hundred twenty-seven and 8/100 feet, more or less, to the northeast corner of said lot; thence west along the north boundary line of said lot, twenty-five feet, more or less, to the northwest corner of said lot; thence south along the west boundary line of said lot, one hundred thirty-eight and 70/100 feet, more or less, to a point where the south boundary line of said right of way intersects the west boundary line of said lot; thence in an easterly direction along the said south boundary line of said right of way to the point of beginning; that they had made valuable and lasting improvements thereon, with the knowledge of and without any objections by the plaintiff or its predecessors in interest, and had paid all taxes and assessments levied upon said premises last above described (which premises are within two hundred feet of the line of said railroad as located and constructed as aforesaid).

That all of said lot three in said block one (1) of said Saunders'
addition has been assessed for the purpose of State, county and
161 city taxation for more than ten years before the commencement of this action, all of which taxes have been paid annually by the defendants, and their grantors; that said lot is bounded on the north by said Sprague avenue, a public th-roughfare in said city running east and west, and at nearly right angles across the right of way and track of plaintiff; that said lot is twenty-five (25) feet in width and one hundred and fifty five (155) feet in length; that the nearest point on said lot from the said tracks of plaintiff is about seventy five feet distant therefrom; that said lot was, several years before the commencement of this action assessed by said city for grading of said avenue, and the assessment was paid by these defendants, and their grantors; that said block one (1) of said addition is located on the northwest quarter of the northwest quarter of section twenty (20), township twenty-five (25) north, of range forty-three (43) E. W. M.; that said land on May 12th, 1879, was entered as a homestead by Henry T. Cowley, and on February 3rd, 1883, he made final proof of said lands, paid the necessary fees, received from the receiver of the land office the proper receipt therefor; and on December 30th, 1884, a patent was issued to him by the United States Government of said lands, and no exception, reservation or mention was made therein whatsoever of said alleged right of way of said

railroad company; that said lands were conveyed by said Cowley to Frank R. Moore by deed dated March 15th, 1883, who platted the said land as an addition to said city under said name on July 20th, 1883, and filed said plat on said day with the auditor of said county. One of the streets so dedicated by said plat was said Sprague avenue; that said Sprague avenue has been used as a public th-roughfare ever since, crossing said tracks; that said defendants obtained paper title to said lot by warranty deed from the grantees of said Moore.

162 The said Northern Pacific Railway Company, or its predecessor in interest has never used the same, or made any attempt to use the same for railroad purposes; nor have they, or either of them, ever objected to or dissented from defendants' claim of ownership thereof until the commencement of this action.

That said evidence and other evidence as to similar facts as to other lots in said block, introduced on behalf of said defendants, also tended to show that the plaintiff and its predecessors have at all times for more than ten years before the commencement of this action abandoned all that portion of its right of way as granted by said act of Congress, included within said lot.

Defendants Jennie McKenzie and James McKenzie introduced evidence proving that for a period of more than ten years next preceding the commencement of this action they had been in the actual, open, continuous, notorious and adverse possession, under color and claim of title, and a claim of absolute ownership of the following described premises, to-wit: all of that portion of said right of way within the boundaries of what are usually designated and described as lots one and two in block one of Saunders' addition to the city of Spokane Falls (now Spokane), and more particularly described as follows to-wit: Beginning at a point where the south line of said right of way intersects the east boundary line of said lot two; running thence north along the east boundary line of said lot two, one hundred thirty eight and 70/100 feet, more or less, to the northeast corner of said lot two; thence west along the north boundary line of said lot two and the north boundary line of said lot one, fifty feet, more or less, to the northwest corner of said lot one; thence south along the west line of said lot one, one hundred and sixty and

163 55/100 feet, more or less, to a point where the said south boundary line of said right of way intersects the west boundary line of said lot one; thence in an easterly direction along the south boundary line of said right of way to the point of beginning; that they had made valuable and lasting improvements thereon more than ten years before the commencement of this action, with knowledge of, and without any objections by the plaintiff or its predecessors in interest, and had paid all taxes and assessments levied upon said premises last above described (which premises are within two hundred feet of the line of said railroad as located and constructed as aforesaid).

That all of said lots one (1) and two (2) of said block one (1) of Saunders' addition to the city of Spokane Falls (now Spokane) have

been assessed for the purposes of State, county and city taxation for more than fifteen years before the commencement of this action, all of which taxes have been paid annually by said defendants, and their grantors; that said two lots are bounded on the north by Sprague avenue, a public thoroughfare in said city of Spokane, running east and west and at nearly right angles across the right of way and track of plaintiff; that said lots one (1) and two (2) are respectively twenty-five (25) feet in width and one hundred fifty five (155) feet in length; that the nearest point on said lots from the railroad tracks of plaintiff is about 60 feet distant therefrom; that said lots were, several years before the commencement of this action assessed by the city of Spokane for the grading of said Sprague avenue, and said assessment was paid by said defendants and their grantors; that said block one (1) of said Saunders' addition is located on the northwest quarter of the northwest quarter of section twenty (20), township twenty-five (25) north, of range forty three (43), E. W. M.; that said land on May 12th, 1879, was entered as a homestead by one Henry T. Cowley and on February 3rd, 1883, he made final proof of said lands, paid the necessary and proper fees, and received from the
164 receiver of the land office a proper receipt therefor, and on December 30th, 1884, a patent was issued to him by the United States Government of said lands, and no exception, reservation or mention was made therein whatsoever of said alleged right of way of said Northern Pacific Railroad Company; that said lands were conveyed by said Cowley to one Frank R. Moore by deed dated March 15, 1883, who platted the same as an addition to the city of Spokane Falls (now Spokane) under the name of "Saunders' addition" on July 20th 1883, filing said plat at said time with the auditor of said county; that one of the streets so named and dedicated to the city of Spokane in said plat was said Sprague avenue; that said Sprague avenue has been used as a public th-roughfare ever since, crossing the tracks of said Northern Pacific Railroad Company; that said defendants obtained paper title to said lots by warranty deed from the grantees of said Frank R. Moore; that said Northern Pacific Railway Company and its predecessor have never used the same, or made any attempt to use the same for railroad purposes, nor have they, or either of them, ever objected to or dissented from defendants' claim of ownership thereof until the commencement of this action.

That said evidence and other similar evidence as to similar facts as to other lots in said block one, introduced on behalf of said defendants, also tended to show that the plaintiff, and its predecessor, the Northern Pacific Railroad Company, have at all times for more than ten years before the commencement of this action abandoned all that portion of its right of way, as granted by said act of Congress, included within said lots one (1) and two (2).

Defendants John J. Browne and Anna W. Browne introduced evidence tending to prove that for a period of more than ten years next

preceding the commencement of this action they had been in the actual, open, continuous, nortorious and adverse possession, under color and claim of title, and a claim of absolute ownership of
165 the following described property in Browne's addition to Spokane Falls (now Spokane), according to the plat thereof of record in the office of the auditor of said county of Spokane, to-wit: Lots ten (10), eleven (11), and twelve (12) in block thirteen (13); lots seven (7), eight (8), nine (9), ten (10), eleven (11) and twelve (12) in block fourteen (14); lots one (1), two (2), three (3), four (4), five (5) and six (6) in block fifteen (15); lots one (1), two (2) and three (3) in block sixteen (16); lots one (1), two (2) and three (3) in block seventeen (17); lots nine (9), ten (10), eleven (11), twelve (12), thirteen (13) and fourteen (14) in block eighteen (18); lots five (5), six (6), seven (7); eight (8), nine (9), and ten (10) in block thirty-two (32); lots one (1), two (2), three (3), four (4) and five (5) in block thirty-three (33); lots six (6) and seven (7) in block thirty-four (34); all of block "A;" that they had made, more than ten years before the commencement of this action, valuable improvements thereon, with the knowledge of, and without any objections by, the plaintiff or its predecessors in interest; and had paid all taxes and assessments levied upon said premises annually from 1880 to 1891, when they became financially embarrassed and unable to pay the same; that said Browne's addition is located upon the north half of the northeast quarter of section twenty-four (24), township twenty-five (25) north, of range forty-two (42) E. W. M.; that these defendants, husband and wife, settled upon all of said land on April 15th, 1879; that said land was then unsurveyed, but was surveyed by the United States Government on October 7th, 1880; that on January 10th, 1881 said John J. Browne made pre-emption entry thereon by filing the necessary and proper instrument in the land office in accordance with the law concerning the same, alleging in his declaratory statement, settlement thereon April 15th, 1879; that on February 1st, 1882, he made final proof and paid for said land in accordance with the law, and received therefor the usual receiver's receipt on that
166 day; that on June 7th, 1883, a patent for all of said land was issued to him by the United States Government, which patent granted to him the whole of said land, without conditions, reservations or mention of said alleged right of way of the Northern Pacific Railroad Company whatsoever; that said John J. Browne paid the United States Government for the whole number of acres of land included within the north half of the northeast quarter of said section, without any reservations or exceptions whatever; that these defendants have been in the possession under color and claim of title, and a claim of absolute ownership thereof of the entire tract of land described as the north half (N. ½) of the northeast quarter (N. E. ¼) of said section twenty-four (24) from time of settlement thereon, as aforesaid, ever since, except Railroad street and the other streets and avenues in Browne's addition after the platting thereof, except such lots in Browne's addition as after the platting

they have sold and conveyed to others; that in June, 1883, and after the issuance of said patent, these defendants caused the whole of said land to be laid off and platted into town lots and blocks, and streets and alleys, and the same to be surveyed, and the lots and blocks and all of them marked on the ground with stakes and stones, and other monuments properly designating the same; and a plat thereof in writing to be made in the manner required by the statutes of the Territory of Washington, showing said lots and blocks, and streets and alleys, and the boundaries and sizes thereof, and called the ground so platted "Browne's addition to Spokane Falls;" and these defendants executed a dedication attached and made a part of said plat, dedicating the streets and alleys marked thereon as public highways, which dedication was executed by them in the manner required by law, which plat was, on July 30th, 1883, filed for record in the office of the auditor of said county of Spokane; that upon said plat was a street marked "Railroad street," which consisted of a strip of land two hundred (200) feet in width,
167 running in a northeasterly direction across the southeasterly part of said land, and all the remainder of said land was subdivided into lots, blocks, streets and alleys, as aforesaid; that the railroad tracks of the plaintiff running across the said land as originally constructed and now operated are in the center of said strip called Railroad street; that said plat shows various other streets running across said Railroad street thus dedicated to the public, many of which have ever since the filing of said plat been used and occupied as public highways by the public, and maintained as such at public expense, and some of them graded at public expense across said railroad tracks and street as well as in other parts thereof; that said city of Spokane Falls (now Spokane) has been ever since the filing of said plat, and the public, ever since said time, have openly and notoriously used said streets throughout the entire length and breadth thereof under color and claim of title and claim of absolute ownership thereof for public highways; that prior to the filing of the plat of Browne's addition, as aforesaid, these defendants paid all taxes assessed upon all of said land annually for State, county and all other purposes, and since the filing of said plat these defendants have annually paid all such taxes assessed upon the lots in issue herein, which taxes amounted to a very large sum of money, except that these defendants have not paid such taxes since the year 1891, and their failure to so pay the same since the year 1891 has been due wholly to financial inability to make such payments; that these defendants also paid assessments for grading of some of the streets crossing said railroad tracks as aforesaid. These defendants offered and introduced evidence tending to show that the original townsite of Spokane Falls (now Spokane) was laid out and platted in the year 1880 by these defendants and others; that in January 1881 the Northern Pacific Railroad Company, aforesaid, by John W. Sprague, general superintendent thereof, laid out

and platted a part of section nineteen (19), township twenty
168 five (25) north, of range forty-three (43) E. W. M., immediately abutting on the original townsite on the south thereof and in the heart of said town, now city, an addition called Railroad addition to Spokane Falls, and that Browne's addition to Spokane Falls, laid out and platted in 1883 abutts on Railroad addition, aforesaid, on the west end thereof; and that it was orally agreed between the defendants John J. Browne and said Sprague, as general superintendent of the Northern Pacific Railroad Company, aforesaid, at the time of platting said original townsite, and before said platting of said Railroad addition by said railroad company as to how various streets should be laid out in said original townsite, said Railroad addition and said Browne's addition when platted, the center of said Sprague street being the dividing line between the original townsite and said Railroad addition, and named after John W. Sprague, general superintendent of the Northern Pacific Railroad Company; and it was especially agreed at said time that the right of way of the Northern Pacific Railroad Company through said section nineteen (19) should be dedicated on the plat of said Railroad addition as "Railroad street" and should be 225.7 feet in width, the remainder of the land abutting on said strip of 225.7 of width on either side thereof should be divided into lots and blocks and that said John J. Browne should, when he platted Browne's addition leave a street to be called "Railroad street" in width two hundred feet, as extension of Railroad street in said Railroad addition on the west, subdividing into lots and blocks the remainder of his said land; that the plat of said Railroad addition filed in January, 1881, was prepared and executed in accordance with said agreement and understanding, and subdivided into lots and blocks all of said original railroad right of way, except a strip of land 225.7 feet in width, which it named "Railroad street," and in the center of which was originally located the tracks of the Northern Pacific Railroad
Company, and that said tracks have remained and been used
169 in the same place ever since; that in 1883 when said John J. Browne platted said Browne's addition he left for the use of said Northern Pacific Railroad Company, in accordance with said agreement a street called "Railroad street" two hundred (200) feet in width, an extension of Railroad street in Railroad addition, as provided by said agreement, subdividing the remainder of said land into lots and blocks; that said Northern Pacific Railroad Company sold in 1881 and subsequent years, nearly all of the lots abutting on said Railroad street on the north side thereof, and a part of the lots abutting on said Railroad street on the south side thereof, and conveyed the same by warranty deed to various persons and parties who have made valuable and lasting improvements thereon at various times during the past nineteen years, such as hotels, merchantile blocks, etc.: That the railroad tracks of the plaintiff and its predecessors *was* originally located in the center of Railroad street in said Browne's addition, and have been used and operated

in the same position ever since, the center line of Railroad street in Browne's addition coinciding with the center line of Railroad street in Railroad addition; that said Northern Pacific Railway Company, or its predecessor, has never used the same, or made any attempt to use the same for railroad purposes before the commencement of this action, nor have they, or either of them, ever objected to or dissented from defendants' claim of ownership thereof, until the commencement of this action; that the said evidence introduced on behalf of the defendants also tended to show that the plaintiff and its predecessors have at all times for more than fifteen years before the commencement of this action abandoned all that portion of its alleged right of way as granted by said act of Congress included with the lots and blocks in issue herein with these defendants.

170 That a portion of each of said lots is situated within two hundred feet of the line of said railroad so definitely located and constructed as aforesaid, and constitute the whole area of the alleged right of way of plaintiff, except the streets and highways and said Railroad street as shown on said plats of Browne's addition.

Plaintiff thereupon, upon each separate trial and as to each of said defendants, requested the court to rule and hold as a matter of law that the premises in question, being a part of the right of way of the plaintiff granted to its predecessor, Northern Pacific Railroad Company, by act of Congress approved July 2, 1864, or any part thereof, could not be aliened or disposed of by such grantee or its successors in title, and that consequently such right of way, or any part thereof, could not be acquired by adverse occupation under State statutes; also that Congress in said act conclusively determined the width of right of way necessary for the use of the Government grantee.

Plaintiff placed its alleged title distinctly upon the construction, scope and effect to be given to said act of Congress and claimed a title derived under said act.

But on each of said separate trials, the court having duly considered the said questions, refused to so rule or hold, and held that title to the lands in controversy—a part of said right of way—could be obtained by adverse possession or abandonment, and all evidence introduced by each and every of the defendants on the subject of adverse possession or abandonment was introduced and received by the court over the objections of plaintiff to each and every of which rulings of the court plaintiff then and there duly excepted, which exceptions were duly allowed.

171 STATE OF WASHINGTON, } *ss:*
County of Spokane, }

I, Leander H. Prather, judge of the superior court in and for the county of Spokane, State of Washington, and the judge who tried the above entitled action, and all the issues therein, to-wit, Northern Pacific Railway Company, plaintiff *vs.* Wm. S. Ely, *et al.*, defendants,

numbered 13,258, in said superior court, do hereby certify: That the above and foregoing matters and proceedings embodied in the foregoing bill of exceptions, are matters and proceedings occurring in the cause; that the same are thereby and hereby made a part of the record therein and herein; that the said bill of exceptions contains all the material facts, matters and proceedings heretofore occurring in the said cause and not already a part of the record therein; that the above and foregoing bill of exceptions contains all the material matters and things occurring upon each of the several and separate trials had in said action and not already a part of the record therein; that it is a bill of exceptions taken and allowed upon and for each of the several and separate trials in said action; that it is settled, allowed and certified as and for a bill of exceptions upon the trial and in the cause of each of the several defendants in said action appearing therein and as to each of the defendants and several defendants having a several and separate trial in said action; that the said bill of exceptions was filed within thirty days after the rendition and entry of decree in said action, and after being filed was duly served upon all parties who have appeared in the action, which service was within thirty days after entry of decree; that amendments having been proposed and duly considered and settled by the court, the above and foregoing bill of exceptions has been, and is hereby, settled and certified as above set forth in the
172 above and foregoing bill of exceptions, as the bill of exceptions herein as to each and all the defendants, and as the bill of exceptions on each of the trials in said action; that each and all the defendants had due and regular notice of application to the court for settling and certifying said bill of exceptions, which notice specified the time and place as authorized and required by law (not less than three or more than ten days after service of notice); that due and legal notice of settling and certifying said bill of exceptions was made, given and served, and all defendants who proposed any amendments or filed any exceptions, appeared, in response to said notice and were present and participated in the hearing of said amendments and exceptions, and the settling and certifying of said bill of exceptions.

Done in open court this 4th day of September, 1900.

LEANDER H. PRATHER, *Judge.*

173 NORTHERN PACIFIC RAILWAY COMPANY, Appellant, *v.* WILLIAM S. ELY ET AL., Respondents. } No. 3681. Filed June 29th, 1901.

This action was brought by the Northern Pacific Railway Company, successor to the Northern Pacific Railroad Company, to recover possession of certain portions of its right of way in the county

of Spokane. The complaint alleges that the plaintiff was the owner and entitled to the possession of a strip of land 400 feet wide, and that defendants had wrongfully entered thereon, and judgment was demanded for the removal of a cloud, for the quieting of title to the lands mentioned in the complaint, and for the possession of same. Separate answers were interposed by many of the defendants, separate trials had and separate verdicts rendered. A single judgment, however, was rendered, determining all the issues in the case.

It may be conceded, we think, that the right of way which embraces the land in dispute was granted to the Northern Pacific Railroad Company by act of Congress in 1864, and that, to the title to the right of way thus granted to the Northern Pacific Railroad Company, the Northern Pacific Railway Company has succeeded. It may also be conceded, for the purposes of this case, that the Northern Pacific Railway Company has complied with all the terms and provisions of the act of Congress aforesaid, and has constructed its railroad through the whole of the line of road between the points named in the granting act, that a map of definite location was filed October 4, 1880, prior to the acquiring of the title to the land in question by the defendants or their predecessors or grantors, and that said railroad has been continuously operated since its construction. The defendants answering claim title by patent from the United States Government. The land was acquired under the preemption and homestead acts, respectively, and all the defendants or their grantors have been in quiet, peaceful, undisturbed and undisputed possession of said land for more than ten years immediately prior to the commencement of this action, many of them for nearly twenty years. Valuable improvements have been made
174 by the defendants, the said land consisting of town lots in the city of Spokane, and having been platted and laid out as additions to the city of Spokane by the defendants or their grantors after acquiring title to the same from the United States Government. During all these years no claim whatever to these lands has been made by the appellant. It has stood by and seen improvements made thereon, and, in the case of defendant Brown, an agreement was entered into between him and General Sprague, who was then the general superintendent of the Northern Pacific Railroad Company, that they would plat their lots so that the streets of the addition which the railroad company was dedicating would correspond with and meet the streets which Brown was dedicating to the city of Spokane, and the agreement was carried out by arranging the streets in accordance therewith. These streets have been used by the public for from ten to eighteen years. The testimony shows that in addition to the improvements which these defendants have made upon their lots, many thousands of dollars have been paid by them for assessments levied upon abutting land for the improvement of streets running through this right of way; that the appellant has never paid these assessments; that they have never been assessed to the appellant and that no question has ever been raised

by the appellant as to the right and obligation of the defendants to pay the same. While the record does not show that any of the lands owned by the defendants were deeded to them by the appellant, it does show that the Northern Pacific Railroad Company has deeded to other parties lots in the city of Spokane situated within the 400 feet of right of way, upon which valuable improvements have been made by its grantees.

The questions involved in this case are, (1) adverse possession of respondents; (2) that the action was barred by the statute of limitations; (3) equitable estoppel by the laches and misconduct of appellant. The questions of fact were put in issue by the pleadings, were submitted to a jury and found in favor of the several defendants, and the court upon said findings entered its decree declaring the title of said lands to be in the defendants. Under our statute,
175 the right to commence an action of this kind is barred after ten years' possession on the part of the defendants, and it may be conceded that the bar is effectual in this case if the statute of limitations runs against the appellant. It is contended by the appellant that it does not, and there is considerable discussion on the proposition of whether the interest of the company in this right of way is merely an easement, or whether it is possessed of a fee simple title. As we view the law, however, these questions are immaterial, for if the statute runs in one instance it would in the other. It is the contention of the appellant that the statute does not run against it for the reason that the right of way is granted in the interest of the public, and that it would be against public policy to allow the company to alienate its right of way, thereby depriving it of the power to carry on the business in aid of which the franchise was granted, and that it must necessarily follow that, if the company could not alienate its lands, public policy would equally prevent an alienation through process of law; that the statute of limitations presupposes a grant by the true owner, and the appellant's successor having been the true owner and the title to the land having been acquired by the defendants subsequent to the acquiring of title by the appellant, that no grant by the true owner had ever been made, and consequently that the statute of limitations did not apply. The statute of limitations, we think, is not based upon such a thought, but is purely and essentially a statute of repose in the interest of the stability of titles and of good morals. One holding land adversely to the rights of another can be divested only by the action of the other, even with a better right, within the time prescribed by the statute of limitations, and this is true even though he may have originally entered under a void grant or sale. But his claim ripens into a perfect title and becomes absolute if such possession is not disturbed within the time prescribed. As is said by Washburn on Real Property, 4th ed., vol. 3, p. 164:

"The operation of the statute takes away the title of the real owner and transfers it, not in form, indeed, but in legal effect, to the adverse occupant. In other words, the statute of limitations

gives a perfect title. The doctrine is stated thus strongly, because it seems to be the result of modern decisions, although it was
176 once held, that the effect of the statute was merely to take away the remedy, and did not bind the estate, or transfer the title."

That the statute of limitations is a statute of repose has been decided by all modern authority including many decisions from this court. See Wickham *v.* Sprague, 19 Wash. 466. There are no exceptions under our statute and it must apply to the case at bar unless the appellant's right to commence the action is guaranteed by some higher authority. The statute is as follows:

"§ 4796. (2 Bal.) Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued. * * *

§ 4797. * * * Within ten years,—1. Actions for the recovery of real property, or for the recovery or possession thereof; and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within ten years before the commencement of the action."

It will be observed that this case does not involve in any manner a construction of the act of Congress incorporating the Northern Pacific Railroad Company, or the granting to the company of its right of way. Neither is this an action against the company as many of the actions are which are cited by the appellant. There is no attempt here to bind the company by an *ultra vires* agreement, but the attempt is on the part of the company to repudiate executed contracts and rights which have grown up through the laches, negligence and direct agreements of the company. Neither is this an action where the court has attempted to determine how much of the right of way was necessary for the railway company to use in operating its road, but it was a determination of the fact of how much of the right of way the railroad company had abandoned, and how much of the right of way according to its own determination it did not need for the purpose of operating its road, and how much it could abandon without defeating the purpose for which the grant was made. Of the cases cited by appellant the strongest one favoring its contention and the only one therefore which it is necessary for us to notice is Northern Pacific Railroad Company *v.* Smith, 171 U. S. 260, and it is claimed by the appellant that in this case the rule was clearly announced that the company could not abandon any portion of its right of way. There are some expressions used by the court in this case which give plausibility to appellant's
177 contention, but there are so many different propositions involved in the case, that it is hard to tell upon what exact proposition the case was decided. Great stress seems to have been placed by the court upon the defect in Smith's deed, and an examination of the cases cited by the court shows that the exact question raised in this case was not involved or considered seriously in that,

although it was decided in that case that the court had no right to determine the question of how many feet had been used and occupied for railroad purposes by the company, and that it was entitled to the number of feet that were granted to it by the Government. The concluding remark of the court is as follows:

"The precise character of the business carried on by such tenants is not disclosed to us, but we are permitted to presume that it is consistent with the public duties and purposes of the railroad company, and, at any rate, a forfeiture for misuser could not be enforced in a private action;"

a proposition which certainly cannot be controverted. But in tha case the company was in possession of the lands sought to be obtained by Smith, the allegation being that it had been, more than six years prior to the commencement of the action, in possession of the premises. So that no question of adverse possession and user or of the statute of limitations was involved, and we do not think that the Supreme Court of the United States, notwithstanding some expressions which are made in this case and which were not necessary for its determination, would, under the circumstances of this case, deprive these defendants of their homes and property where a title had been obtained through the Government and where, by consent, agreement and acquiescence of the company, time and money had been expended in their improvement during all these years of quiet and undisputed possession. If the doctrine of estoppel can ever be invoked it seems to us that it should be invoked in this case against the appellant. If any event, the question of protecting the rights of the Government is not one which can be raised by the appellant. If the rights of the Government are in any way involved or jeopardized by the possession of these lands by the defendants,
178 the Government may act in the premises unaided by the appellant whose negligence and laches have been the cause of these investments by the defendants. The appellant should not be allowed to escape the consequences of its own wrongful acts and reap a fraudulent benefit by pleading the rights of the Government. Indeed, our Government is presumably founded upon equitable principles, not in theory alone but in practice, and the citizen has a right to expect equitable treatment even at the hands of the Government; and it has been held that in good conscience the Government is frequently estopped from asserting rights which would destroy the equitable rights of the citizen. In State of Wisconsin *ex rel.* Att'y Gen. *v.* Janesville Water Power Co., 32 L. R. A. 391, it was held that leave would not be granted to the State to institute an action to forfeit the franchises of a solvent, active corporation, carrying out the purposes of its creation in supplying the necessities of a large number of people, whose securities are held by innocent persons, in the absence of a clear wilful misuse, abuse or nonuse of its franchises. In that case the court quotes from Com. *v.* Bala & B. M. Turnp. Co., 153 Penn. St. 47, where the court held that in case

of delay accompanied by circumstances which would estop individuals, the State was equally estopped. There the circumstances showed that a corporation had been allowed to proceed and expend large sums of money when the facts relied upon in the application for leave to bring the action to forfeit the franchise were notorious; held, that the delay under the circumstances created an estoppel so as to effectually prevent the institution of such proceedings. The court in effect said: *If the complainant were* a private individual the court would not hesitate to say that his laches were a bar; and the same rule holds good notwithstanding the application is by the attorney general on behalf of the State. The question involved is not one under the statute of limitations, but one of laches, which may be imputed to the State as well as to an individual. While time does not run against the State, time, together with other elements, may make up a species of fraud, and estop
179 even sovereignty from exercising its legal rights; citing

Willmott *v.* Barber, L. R., 15 Ch. Div. 105;
Att'y Gen. *v.* Johnson, 2 Wils. Ch. 102;
Att'y Gen. *v.* Delaware & B. B. R. Co., 27 N. J. Eq. 1.

The court concluding said:

"The principles here maintained should be quite rigidly applied where, as in this case, the corporation has not merely been allowed, but has been compelled, by those chiefly interested and the real moving parties, to proceed at great expense, under the franchise sought to be annulled, for a considerable period of time, while the facts relied upon as grounds for forfeiture have been all well known."

This language might be appropriately applied to the facts in this case, and could as well *as* applied to the individual defendants here as to corporate defendants there; for these defendants have not only been allowed to possess these lots, but the title to them has been conveyed to them by the Government of the United States after a compliance on their part with the requirements of the law in relation to pre-emption and homestead claims, and after, in addition to the expense and time necessarily involved in obtaining title under these acts from the Government, the expenditure of many thousands of dollars in creating permanent improvements on these lands, and in paying many thousands of dollars assessments for the improvement of streets in addition to other taxes for the benefit of the Government, with the knowledge and acquiescence and in some cases the actual agreement of the appellant. It is also held in Com. *v.* Turnpike Co., *supra*, that where a turnpike company is allowed, without objection, to expend a large amount of money in extending its road, under authority of and a decree of court, a Commonwealth is estopped to question the regularity of the proceedings under which such authority was granted. There again the court said:

"In England from whence we derive the great body of common law, and most of our principles of equity, it is well settled that, while time will not run against the Crown, yet time, together with other elements, may make up a species of fraud, and estop even sovereignty from exercising its legal rights;"

citing Att'y Gen. *v.* Johnson, *supra*, where there was an attempt *on behalf of the Crown to restrain* a purpresture in the River Thames, and the court refused to entertain the bill because of the delay on the part of the attorney general in instituting the
180 proceeding. Citing also Att'y Gen. *v.* Sheffield Gas Consumers Co., 3 De Gex, M. & G., 304. See also Att'y Gen. *v.* Railway Co., 27 N. J. Eq. 631.

As showing that the rule that the company cannot alienate any part of its right of way is not to be literally construed, it has been decided that a railroad company to which Congress has granted a right of way across the public lands and sections of lands adjoining such right of way, in aid of the construction of its road, has power to dedicate to the public right to cross its tracks and right of way.

N. P. R. Co. *v.* City of Spokane, 64 Fed. 506.

On the proposition that when a corporation has made contracts in violation of its powers, the validity of such contracts can be questioned only by the Government, see

Nal'l Bank *v.* Matthews, 98 U. S. 621.

No case is cited by the appellant which holds that a railway company may not lose a part of its right of way by adverse possession by abandonment or estoppel, and we do not think that any case can be found which advances those propositions, but many courts have held the reverse. In Pittsburgh etc. Ry. Co. *v.* Stickley, 58 N. E. 193, it was held by the supreme court of Indiana that adverse possession acquiesced in by the company for the statutory period prevented a recovery, and we cannot do better than insert a portion of the opinion of the court in that case:

"Appellant finally insists that land acquired by a railway company for right of way or station purposes cannot be taken from it by adverse possession, because a railroad is a public highway, and because the statute forbids interference with the company's exclusive use. A railway company owes certain duties to the public, but it holds and uses its property for the profit of its stockholders. The cases holding that the statute of limitations affords no defense to actions for encroachment upon streets and roads are inapplicable. A railroad is not a public highway in the sense that it belongs to the people. Railroad officers are not governmental agents whose laches creates no bar. It is true that, for reasons of public policy, a judgment creditor will not be permitted to destroy a railroad by cutting it into parcels on execution sales, if the company resists. * * * If a company voluntarily disable itself to perform its duties to the public, its charter may be forfeited. But there is no

reason why a railway company should not be permitted to dispose of land it does not need in fulfilling its public duties, or why, if it disposes of land it does need, it should not be compelled, if it wishes to avoid a forfeiture of its charter, to re-acquire the land by purchase or condemnation. It is true that the statute entitles a railway company to take land in fee, and forbids interference
181 with the company's exclusive use. But the right to the exclusive use (*which* is an incident to every unqualified ownership) must be asserted. If one occupies adversely for 20 years land owned by a railway company, the statute of limitations should raise the presumption of a grant, for the company holds its lands for private gain, as a private proprietor. The State confers the power of eminent domain to enable railway companies to perform efficiently their duties as common carriers. But it is not apparent why the State should be concerned in preventing investors in railway stocks from sustaining loss through the negligence of their agents;" citing

Railroad Co. *v.* Houghton, 126 Ill. 233; 18 N. E. 301; 1 L. R. A. 213;
Same *v.* O'Connor, 154 Ill. 550; 39 N. E. 563;
Same *v.* Moore, 160 Ill. 9; 43 N. E. 364;
Donahue *v.* Railroad Co., 165 Ill. 640; 46 N. E. 714;
Railroad Co. *v.* Wakefield, 173 Ill. 564; 50 N. E. 1002;
Matthews *v.* Railway Co., 110 Mich., 170; 67 N. W. 1111;
Bobbett *v.* Railway Co., 9 Q. B. Div. 424;
Norton *v.* Railway Co. 13 Ch. Div. 268;
Railway Co. *v.* Rousseau, 17 Ont. App. 483;

In Matthews *v.* Railway Co., *supra*, it was held that, after a right to use land as part of its right of way had been granted to a railroad company, and such company fenced its right of way excluding such land, and thereafter the grantor conveyed the land to the plaintiff who inclosed the same and used it for crops and pasturage, openly and continuously, without the assent of the company, for more than fifteen years, the plaintiff acquired title by adverse possession. To the same effect are numerous other cases. In fact it seems to be the universal authority.

The case of Northern Counties Investment Trust, Limited, *v.* Enyard, (N. P. R. Co. intervener) 64 Pac. 516, cited in appellant's reply brief in support of the position that possession for more than the statutory time on a railroad right of way was not adverse but permissive, shows, on examination, that the circumstances surrounding it were altogether different from the circumstances surrounding the case at bar. Under the circumstances of that case it was held that the occupancy of a portion of the right of way of the railroad company by the owner of a servient estate was not inconsistent with the easement, the occupation there being for the purposes of farming the land embraced in the right of way. We do not desire to extend the rule enunciated in that case. But whether or not the

facts in that case warranted the conclusion reached by the court, certainly the circumstances shown by the record in this case
182 will not justify the conclusion reached in that, that the occupancy of the defendants taken in connection with the improvements and the use to which the improvements were put was not inconsistent with the appellant's right to use the same for railroad purposes.

In consideration of all the circumstances surrounding this case and of the underlying principles governing rights and remedies, we are of the opinion that the judgment should be affirmed.

DUNBAR, *J.*

We concur:

REAVIS, *C. J.*
FULLERTON, *J.*
MOUNT, *J.*
ANDERS, *J.*
WHITE, *J.*
HADLEY, *J.*

183 In the Supreme Court of the State of Washington, Tuesday, July 30, 1901.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant, *v.* WILLIAM S. ELY ET AL., Respondents. } No. 3681. Judgment.

This cause having been heretofore submitted to the court on the transcript of the record of the superior court of Spokane county and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises and having filed its opinion in writing, it is now on this 30th day of July, A. D. 1901, on motion of Samuel R. Stern, Esquire, of counsel for respondents, considered, adjudged and decreed that the judgment of the said superior court be and the same is hereby affirmed with costs, and that the said William S. Ely *et al.* have and recover of and from the said Northern Pacific Railway Company and from F. H. Mason and Henry M. Richards, sureties, the costs of this action taxed and allowed at one hundred & thirty-one and 25/100 dollars, and that execution issue therefor. And it is further ordered that this cause be remitted to the said superior court for further proceedings in accordance with the opinion herein filed.

184 STATE OF WASHINGTON:

In Supreme Court.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
WILLIAM S. ELY, MARVIN ARNOLD, JULIA ARNOLD, COVERT August, Pauline E. August, Michael Blessing, Mary Blessing, John J. Browne, Anna W. Browne, Z. Colby, Sophia Colby, Equitable Trust Company (Otherwise Known as Jennings Trust Company), Joseph B. Goodner, Sallie Goodner, Eugene G. Germond, Claudia A. Germond, Anton Hahn, I. S. Kaufman, Claribel Kaufman, Jacob Loertcher, James McKenzie, Jennie McKenzie, Northwestern and Pacific Hypotheekbank, Gustave Reith, Olof Hammerlund, Carl J. Berggren, W. F. Mitchem, Ida Mitchem, James Albi, William Albi, Henry Willey, Sarah Willey, the Heirs of James Laughlin, Deceased, and John Kildea, Administrator of Estate of James Laughlin, Deceased, Defendants in Error.

Now comes The Northern Pacific Railway Company, a corporation, plaintiff in error, and prays that a writ of error in the above entitled cause may issue to said the supreme court of the State of Washington, to review a certain judgment entered in said court on the 30th day of July, 1901, in favor of the said William S. Ely, Marvin Arnold, Julia Arnold, Covert August, Pauline E. August, Michael Blessing, Mary Blessing, John J. Browne, Anna W. Browne, Z. Colby, Sophia Colby, Equitable Trust Company (otherwise known as Jennings Trust Company), Joseph B. Goodner, Sallie Goodner, Eugene G. Germond, Claudia A. Germond, Anton Hahn, I. S. Kaufman, Claribel Kaufman, Jacob Loertcher, James McKenzie, Jennie McKenzie, Northwestern and Pacific Hypotheekbank, Gustave Reith, Olof Hammerlund, Carl J. Berggren, W. F. Mitchem, Ida Mitchem, James Albi and William Albi, Henry Willey and Sarah Willey, the heirs of James Laughlin, deceased, John Kildea, as administrator of the estate of James Laughlin, deceased, defendants in error, and against the said Northern Pacific Railway Company, plaintiff in error, affirming a judgment entered in the superior court of the State of Washington, in and for the county of Spokane, in favor of said defendants in error, for the reason that manifest error hath intervened in the rendition of said judgment of said supreme court of the State of Washington to the great damage of the said plaintiff in error, and the said Northern Pacific Railway Company, plaintiff in error, assigns the following
185 errors in the rendition of said judgment by the supreme court of Washington:

1. The court erred in affirming the judgment of the superior

court of the State of Washington, in and for the county of Spokane.

2. The court erred in holding and deciding that any portion of the right of way granted by that certain act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast by the northern route," to the Northern Pacific Railroad Company, could be acquired by adverse possession and occupation of the defendants under the statutes of Washington.

3. The court erred in denying the title of the Northern Pacific Railway Company to the premises in controversy founded upon the grant by the United States to the Northern Pacific Railroad Company, the predecessor in interest of said Northern Pacific Railway Company.

4. The court erred in holding and deciding that any portion of the right of way in controversy could be alienated by the Northern Pacific Railway Company or its predecessor in interest, the Northern Pacific Railroad Company.

5. The court erred in holding and deciding that any portion of the right of way in controversy was lost by the Northern Pacific Railway Company, or its predecessor in interest, the Northern Pacific Railroad Company, by abandonment or by acquiescence in the occupation and improvement thereof by said defendants.

6. The court erred in holding and deciding that any portion of the right of way in controversy was lost by the Northern Pacific Railway Company, or its predecessor in interest, the Northern Pacific Railroad Company, by estoppel.

7. The court errred in its judgment wherein and whereby it held that the defendants in error had the right to use and occupy the premises in controversy notwithstanding the grant thereof under the said act of Congress of July 2, 1894, to the said Northern Pacific Railroad Company, the predecessor in interest of the plaintiff in error.

NORTHERN PACIFIC RAILWAY COMPANY,

186 By C. W. BUNN,
JAMES B. KERR,
H. M. STEPHENS,
JOHN M. BUNN, *Its Attorneys.*

Writ allowed.

MARK A. FULLERTON,
Chief Justice and Presiding Justice of Supreme Court of Washington.

Indorsed: Filed Jun- 30, 1903 C. S. Reinhart, clerk. F. S. Guyot, dep.

18—102

187 Know all men by these presents, that we, Northern Pacific Railway Company, as principal, and F. H. Mason and J. F. Herrick, of the city of Spokane, county of Spokane, State of Washington, as sureties, are firmly bound unto William S. Ely, Marvin Arnold, Julia Arnold, Covert August, Pauline E. August, Michael Blessing, Mary Blessing, John J. Browne, Anna W. Browne, Z. Colby, Sophia Colby, Equitable Trust Company (otherwise known as Jennings Trust Company), Joseph B. Goodner, Sallie Goodner, Eugene G. Germond, Claudia A. Germond, Anton Hahn, I. S. Kaufman, Claribel Kaufman, Jacob Loertcher, James McKenzie, Jennie McKennie, Northwestern and Pacific Hypotheekbank, Gustave Reith, Olof Hammerlund, Carl J. Berggren, W. F. Mitchem, Ida Mitchem, James Albi, William Albi, Henry Willey, Sarah Willey, the heirs of James Laughlin, deceased, and John Kildea as administrator of estate of James Laughlin, deceased, in the full and just sum of five hundred (500) dollars, to be paid to the said William S. Ely, Marvin Arnold, Julia Arnold, Covert *Arnold*, Pauline E. August, Michael Blessing, Mary Blessing, John J. Browne, Anna W. Browne, Z. Colby, Sophia Colby, Equitable Trust Company (otherwise known as Jennings Trust Company), Joseph B. Goodner, Sallie Goodner, Eugene G. Germond, Claudia A. Germond, Anton Hahn, I. S. Kaufman, Claribel Kaufman, Jacob Loertcher, James McKenzie, Jennie McKenzie, Northwestern and Pacific Hypotheekbank, Gustave Reith, Olof Hammerlund, Carl J. Berggren, W. F. Mitchem, James Albi, William Albi, Henry Willey, Sarah Willey, Ida Mitchem, the heirs of James Laughlin, deceased, and John Kildea as administrator of estate of James Laughlin, deceased, their heirs, successors, representatives or assigns, to which payment well and truly to be made we bind ourselves, our heirs, successors, representatives, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of June, in the year of our Lord one thousand nine hundred and three.

Whereas, lately, in the supreme court of the State of Washington, in a suit pending in said court between Northern Pacific Railway Company, plaintiff, and William S. Ely, Marvin Arnold, Julia Arnold, Covert August, Pauline E. August, Michael Blessing,

188 Mary Blessing, John J. Browne, Anna W. Browne, Z. Colby, Sophia Colby, Equitable Trust Company (otherwise known as Jennings Trust Company), Joseph B. Goodner, Sallie Goodner, Eugene G. Germond, Claudia A. Germond, Anton Hahn, I. S. Kaufman, Claribel Kaufman, Jacob Loertcher, James McKenzie, Jennie McKenzie, Northwestern and Pacific Hypotheekbank, Gustave Reith, Olof Hammerlund, Carl J. Berggren, W. F. Mitchem, Ida Mitchem, James Albi, William Albi, Henry Willey, Sarah Willey, the heirs of James Laughlin, deceased, and John Kildea, as administrator of estate of James Laughlin, deceased, defendants, judgment was rendered against the said plaintiff, Northern Pacific Railway Company, and the said plaintiff having obtained a writ of error and filed a copy thereof in the office of the clerk of said court to reverse

the judgment in the aforesaid cause, and the citation directed to the said William S. Ely, Marvin Arnold, Julia Arnold, Covert August, Pauline E. August, Michael Blessing, Mary Blessing, John J. Browne, Anna W. Browne, Z. Colby, Sophia Colby, Equitable Trust Company (otherwise known as Jennings Trust Company), Joseph B. Goodner, Sallie Goodner, Eugene G. Germond, Claudia A. Germond, Anton Hahn, I. S. Kaufman, Claribel Kaufman, Jacob Loertcher, James McKenzie, Jennie McKenzie, Northwestern and Pacific Hypotheekbank, Gustave Reith, Olof Hammerlund, Carl J. Berggren, W. F. Mitchem, Ida Mitchem, James Albi, William Albi, Henry Willey, Sarah Willey, the heirs of James Laughlin, deceased, and John Kildea, as administrator of estate of James Laughlin, deceased, defendants, citing and admonishing them to be and appear at the Supreme Court of the United States at Washington, in the District of Columbia on or before the 29th day of August, 1903.

Now, the condition of the above obligation is such that if the said Northern Pacific Railway Company shall prosecute said writ of error to effect and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

NORTHERN PACIFIC RAILWAY COMPANY, [SEAL.]
By JOHN M. BUNN, *Agent and Attorney.*
F. H. MASON. [SEAL.]
J. F. HERRICK. [SEAL.]

189 Sealed and delivered in presence of
E. T. WHITE.

STATE OF WASHINGTON, } ss:
County of Spokane, }

F. H. Mason and J. F. Herrick being first duly sworn, each for himself, and not one for the other, deposes and says:

That he is one of the parties who made and executed the above and foregoing bond for and on behalf of The Northern Pacific Railway Company, plaintiff in error in the cause mentioned therein, as one of the sureties upon said bond, and for the purpose of effecting and perfecting a writ of error therein; that he is a resident of the county of Spokane, State of Washington, and is worth the sum of five hundred dollars ($500) over and above all debts and liabilities in separate property within the State of Washington exclusive of property exempt from execution.

[SEAL.]

F. H. MASON.
J. F. HERRICK.

Subscribed and sworn to before me this 27th day of June, 1903.

E. T. WHITE,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

The foregoing bond is approved as to form and sufficiency.

MARK A. FULLERTON,
Chief Justice of the Supreme Court of the State of Washington.

190 UNITED STATES OF AMERICA:

The President of the United States to the honorable supreme court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of plea, which is in the said supreme court of the State of Washington, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had, in a suit between Northern Pacific Railway Company, plaintiff, and William S. Ely, Marvin Arnold, Julia Arnold, Covert August, Pauline E. August, Michael Blessing, Mary Blessing, John J. Browne, Anna W. Browne, Z. Colby, Sophia Colby, Equitable Trust Company (otherwise known as Jennings Trust Company), Joseph B. Goodner, Sallie Goodner, Eugene G. Germond, Claudia A. Germond, Anton Hahn, I. S. Kaufman, Claribel Kaufman, Jacob Loertcher, James McKenzie, Jennie McKenzie, Northwestern and Pacific Hypotheekbank, Gustave Reith, Olof Hammerlund, Carl J. Berggren, W. F. Mitchem, Ida Mitchem, James Albi, William Albi, Henry Willey, Sarah Willey, the heirs of James Laughlin, deceased, and John Kildea as administrator of estate of James Laughlin, deceased, defendants, wherein was drawn in question the validity of a statute or an authority exercised under the United States, and the decision was against its validity, a manifest error hath intervened, to the great damage of the said Northern Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with
191 this writ, so that you may have the same at the city of Washington, in the District of Columbia, within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 29th day of June, in the year of our Lord one thousand nine hundred and three.

[Seal United States Circuit Court, District of Washington.]

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the District of Washington.

The above writ is hereby allowed.

MARK A. FULLERTON,
Chief Justice of Supreme Court of Washington.

192 [Endorsed:] 3681 Filed Jun- 30 1903. C. S. Reinhart, clerk. F. S. Guyot, dep.

193 United States of America to William S. Ely, Marvin Arnold, Julia Arnold, Covert August, Pauline E. August, Michael Blessing, Mary Blessing, John J. Browne, Anna W. Browne, Z. Colby, Sophia Colby, Equitable Trust Company (otherwise known as Jennings Trust Company), Joseph B. Goodner, Sallie Goodner, Eugene G. Germond, Claudia A. Germond, Anton Hahn, I. S. Kaufman, Claribel Kaufman, Jacob Loertcher, James McKenzie, Jennie McKenzie, Northwestern and Pacific Hypotheekbank, Gustave Reith, Olof Hammerlund, Carl J. Berggren, W. F. Mitchem, Ida Mitchem, James Albi, William Albi, Henry Willey, Sarah Willey, the heirs of James Laughlin, deceased, and John Kildea, as administrator of estate of James Laughlin, deceased, Greeting:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States, in the District of Columbia, within sixty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Washington, wherein The Northern Pacific Railway Company (a corporation) is plaintiff in error and you and each and all of you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned, should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable Mark A. Fullerton, chief justice of the supreme court of the State of Washington, this 30th day of June, in the year of our Lord one thousand nine hundred and three.

MARK A. FULLERTON,
Chief Justice of the Supreme Court of the State of Washington.

194 Personal service of the above and foregoing (attached) citation by receipt of a full, true, and correct copy thereof is hereby admitted, at Spokane, State of Washington, this 1st day of July, A. D. 1903.

SAM'L R. STERN,
Attorney for Defendant in Error, William S. Ely.

F. T. POST,
Attorney for Defendants in Error John J. Browne, Anna W. Browne, Isaac S. Kaufman, Claribel Kaufman, Equitable Trust Company (Otherwise Known as Jennings Trust Company), Northwestern and Pacific Hypotheekbank, Jennie McKenzie, James McKenzie, Joseph B. Goodner, Sallie Goodner, Covert August, Pauline E. August, Henry Willey, and Sarah Willey.

HENLEY, KELLAM & LINDSLEY,
Attorneys for Defendants in Error Jacob Loertcher, Eugene G. Germond, Claudia A. Germond, Olof Hammerlund, Carl J. Berggren, W. F. Mitchem, Ida Mitchem, James Albi, and William Albi.

SCOTT & ROSSLOW &
JOHN B. HESS,
Attorneys for Defendants in Error Anton Hahn, Z. Colby, and Sophia Colby.

JAMES DAWSON,
Attorney for Defendants in Error Gustave Reith, Marvin Arnold, Julia Arnold, Michael Blessing, Mary Blessing, and John Kildea, as Administrator of the Estate of James Laughlin, Deceased.

195 [Endorsed:] 3681. Filed Jul- 6, 1903. C. S. Reinhart, clerk.

196 In the Supreme Court of the State of Washington.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant,
v.
WILLIAM S. ELY ET AL., Respondents.
} No. 3681. Clerk's Certificate.

STATE OF WASHINGTON,
County of Thurston, } ss:

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct transcript of the record in the above entitled cause, as the same now remains on file in my office; that, as required by law, I herewith transmit the same to the United States Supreme Court, together with the original writ of error and the original citation.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Olympia, this 29th day of July, 1903.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*
F. S. GUYOT, *Dep.*

Endorsed on cover: File No. 19,043. Washington supreme court. Term No. 102. The Northern Pacific Railway Company, plaintiff in error, *vs.* William S. Ely, Marvin Arnold, Julia Arnold, *et al.* Filed August 13th, 1903. File No. 19,043.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 102 (and No. 88).

THE NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM S. ELY, MARVIN ARNOLD, JULIA ARNOLD, *et al.*

STATEMENT.

This suit was begun by the Northern Pacific Railway Company in the Superior Court of Spokane County, a court of the State of Washington of original jurisdiction. Its purpose was, to determine the title to, and recover, what the plaintiff alleged was a part of its right of way granted by section 2 of the act of Congress of July 2, 1864. The complaint alleged title to the premises in dispute by virtue of the act of Congress (Transcript pp. 3-7); that the railroad was located and constructed in ac-

cordance with the terms of the act; that the lands in dispute were public lands of the United States free from claims when the grant was made, and that the lands were within two hundred feet of the located and constructed track (Transcript, pp. 7-8).

Defendants divided in their answers, several separate answers being filed. They will be found at Transcript pp. 10 to 64.

Separate trials were had on the different answers, some before juries, one before the court without a jury. In the jury trials verdicts were returned for the defendants below (Transcript pp. 84-88); and in the trial by the court there was a finding of facts (Transcript p. 91).

Judgment was entered against the plaintiff in error upon the verdicts and upon the finding of the court (Transcript pp. 96-104). This judgment was affirmed by the supreme court of Washington (Transcript pp. 127-135) and the judgment of that court is brought here by writ of error.

A bill of exceptions preserves the evidence and exceptions upon the trials (Transcript pp. 111-127), and that, with the finding upon trial of the William S. Ely answer (Transcript p. 91), is the record of the facts.

The bill of exceptions shows that upon the trials each of the defendants admitted the incorporation of the Northern Pacific Railroad Company by the act of Congress of July 2, 1864; and admitted that the act was accepted by the company; that in accordance with its provisions the company located and constructed its railroad and filed its map of

definite location of that part of the line crossing the premises in controversy on the 4th day of October, 1880; that the line was duly constructed over the premises, which were on July 2, 1864, free public lands of the United States, upon the located line; that plaintiff in error is a corporation under the laws of Wisconsin (Transcript pp. 111-112).

Plaintiff in error proved that the premises were within two hundred feet of the railroad, which had been continuously operated since 1881 (Transcript p. 112).

Plaintiff in error proved its successorship to the *federal corporation* by evidence which was objected to by only two of the defendants; their objections are stated in the record and we apprehend will not be urged here (Transcript p. 112).

The ground upon which the title derived by plaintiff in error from the act of Congress was defeated, as well as the federal question which gives this court jurisdiction to review the judgment of the state court, is best shown by the following extract from the bill of exceptions (Transcript p. 126):

> "Plaintiff thereupon, upon each separate trial and as to each of said defendants, requested the court to rule and hold as a matter of law that the premises in question, being a part of the right of way of the plaintiff granted to its predecessor, Northern Pacific Railroad Company, by act of Congress approved July 2, 1864, or any part thereof, could not be aliened or disposed of by such grantee or its successors in title, and that consequently such right of way, or any part thereof, could not be acquired by adverse occupation under State statutes; also that Congress in said act conclusive-

ly determined the width of right of way necessary for the use of the Government grantee.

Plaintiff placed its alleged title distinctly upon the construction, scope and effect to be given to said act of Congress and claimed a title derived under said act.

But on each of said separate trials, the court having duly considered the said questions, refused to so rule or hold, and held that title to the lands in controversy—a part of said right of way—could be obtained by adverse possession or abandonment, and all evidence introduced by each and every of the defendants on the subject of adverse possession or abandonment was introduced and received by the court over the objections of plaintiff to each and every of which rulings of the court plaintiff then and there duly excepted, which exceptions were duly allowed."

As thus shown, the State court held that the title to the right of way or some part of it, granted the Northern Pacific Railroad Company by the act of Congress of July 2, 1864, could be taken from it by adverse possession or abandonment, and this is the proposition brought here for review.

It is not profitable to state the particular evidence, which each defendant in error offered as to his parcel, showing possession in him or his grantors and acts of acquiescence of the Railroad and Railway Companies tending to show a voluntary abandonment of the premises. The brief facts are, that the lands in suit lay within several forty acre tracts which were entered by different people at different times, as stated in the bill of exceptions, between the years 1879 and 1884. The Railroad

Company did not fence or otherwise actually occupy its right of way to the full width. Plats were filed by grantors of defendants in error which encroached upon the Railroad's 400 foot strip, and lots and parcels within the encroachment were sold to different people (either defendants in error or their grantors) who went into possession. We freely concede, and the bill of exceptions shows beyond controversy, that the premises in question, or most thereof, are actually occupied and have been for some years, the time of occupation varying as to different parcels as shown in the record, and that portions of the premises have substantial improvements. That these improvements must have been made—at least to some extent—with the knowledge of the agents and officers of the Northern Pacific Railroad Company, is we think self evident and must also be admitted. The facts, moreover, confessedly suggest that some at least of the officers and agents of the Northern Pacific Railroad Company, the federal corporation, must have supposed that the company had no title to the premises. These admissions, we think, concede all the facts that the defendants in error can assert. There is no proof or suggestion that the Railroad Company or the Railway Company has ever executed a conveyance of any part of the premises, and therefore the case is unaffected by the act of Congress of April 28, 1904. The statement of the evidence of adverse possession and acquiescence of the Railroad and Railway Companies is contained in pages 112 to 126 Transcript.

Assignment of Errors.

Errors are properly assigned (Transcript p. 137). They are summed up in one proposition, to-wit: that the court erred in holding that the premises in suit, being right of way granted by the act of Congress of July 2, 1864, were lost to the plaintiff in error by adverse possession, or by abandonment and acquiescence in the occupation and improvement of the defendants in error.

Argument.

We regard every question which can be suggested upon this record as settled by *Northern Pacific Railway Co. v. Townsend*, 190 U. S. 267, decided since the state court rendered its judgment in this suit. We submit that the judgment below must be reversed upon the authority of the *Townsend* case.

One suggestion is perhaps called for in view of the opening sentence of the opinion in that case. It is there said:

> "As the grant of the right of way, the filing of the map of definite location, and the construction of the railroad within the quarter section in question preceded the filing of the homestead entries on such section, the land forming the right of way therein was taken out of the category of public lands subject to preemption and sale."

In the case at bar, it is true only as to a portion of the lands, that the filing of the map of definite location and the construction of the railroad antedated the private entry. But this court has in two

cases decided, after thorough consideration, that *the right of way grant* in acts of Congress like the Northern Pacific grant, *unlike the land grant*, is effective from the *date of the act*, and the only question is, whether the land was public land at that date. *Railroad Company v. Baldwin*, 103 U. S. 426; *Bybee v. Oregon & California Railroad Co.*, 139 U. S. 663, 679-680.

The court's attention should be called to a question of practice. Two writs of error were sued out; one is No. 102, the other No. 88 of the present docket. In No. 88 the petition for the writ refers to a judgment of the supreme court of Washington entered on the "29th day of June." This date was that of the filing of the court's opinion; but the judgment was entered July 30; so a new writ was sued out, No. 102, upon a petition describing the judgment as entered on the "30th day of July, 1901."

Plainly, if the first writ of error No. 88 is regular and brings up the judgment, the second No. 102 should be dismissed. The same would be true if the petition in No. 88 were amended so as to state the date of the judgment correctly. But if the writ in No. 88 does not bring up the judgment and the petition is not amended, No. 102 is properly before the court.

Plaintiff in error therefore moved the court in the alternative, either for an order amending the

petition for writ in No. 88 so as to state the correct date of the judgment below, or an order dismissing the writ of error in that case. At the last term (October 19, 1903) the court postponed action on the motion until the cases were reached to be heard on the merits. We refer the court to the brief filed on the motion.

Counsel have filed a stipulation that the record in No. 88 need not be printed and that both cases may be heard on the record in No. 102.

C. W. BUNN and
JAMES B. KERR,
for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 366.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM S. ELY, et al.,
Defendants in Error.

MOTION ON BEHALF OF THE PLAINTIFF IN ERROR FOR AN ORDER AMENDING PETITION FOR WRIT OF ERROR OR, IF THIS MOTION IS DENIED, FOR AN ORDER DISMISSING THE WRIT OF ERROR.

To the Honorable, the Supreme Court of the United States:

Comes now the plaintiff in error above named and moves the court as follows:

I.

For an order amending the petition for writ of error herein by striking out from the first paragraph thereof the words "29th day of June," and inserting in place thereof the words "30th day of July."

II.

If the foregoing motion is denied, for an order dismissing the writ of error herein on the ground that the decision sought to be reviewed is not the final judgment of the supreme court of the state of Washington.

The foregoing motions are based on the record herein and on the statement hereto attached.

C. W. BUNN and
JAMES B. KERR,
Counsel for Plaintiff in Error.

STATEMENT.

I.

The opinion of the supreme court of Washington in this cause was filed on June 29th, 1901, and concluded with this language: "In consideration of all the circumstances surrounding this case, and of the underlying principles governing rights and remedies, we are of opinion that the judgment should be affirmed."

On July 30th, 1901, in pursuance of this opinion, a formal judgment of affirmance and for costs was entered in the same court. A copy of this judgment is attached hereto, marked Exhibit "A."

The petition for writ of error herein, a copy of which is hereto attached, marked Exhibit "B," through a mistake as to the date of the entry of the judgment of affirmance, prayed a writ of error "to review a certain judgment entered in said court on the 29*th day of June*, 1901." This was the date of the *opinion*, but not the date of the *judgment*.

Upon this petition a writ of error was allowed. It is in the usual form and a copy is hereto attached, marked Exhibit "C."

The erroneous statement of the date of the judgment sought to be reviewed was a plain inadvertence. The plaintiff in error asks leave to amend the petition so that it will correctly state the date of the judgment of the court below.

II.

If the court declines leave to amend, the plaintiff in error desires to dismiss this writ of error. Upon discovering the mistake in the petition the plaintiff in error sued out a second writ of error to review the judgment to which return has been duly made and that cause is docketed as No. 392, October Term, 1903. The proceedings in No. 392 are regular in all respects unless the writ of error in this case No. 366 is sufficient to review the final judgment below and the writ of error docketed as No. 392 is irregular because it is a second writ of error to review the same judgment.

As bearing on the practice in this court in such cases the court is referred to *Wheeler v. Harris*, 13 Wall. 51.

Respectfully submitted,

C. W. BUNN and

JAMES B. KERR,

Counsel for Plaintiff in Error.

EXHIBIT A.

In the Supreme Court of the State of Washington.
Tuesday, July 30, 1901.

NORTHERN PACIFIC RAILWAY COMPANY,
Appellant.

vs. No. 3681.

WILLIAM S. ELY, et al.,
Respondents.

JUDGMENT.

This cause having been heretofore submitted to the court on the transcript of the record of the superior court of Spokane county and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises and having filed its opinion in writing, it is now on this 30th day of July, A. D. 1901, on motion of Samuel R. Stern, Esquire, of counsel for respondents, considered, adjudged and decreed that the judgment of the said superior court be and the same is hereby affirmed with costs, and that the said William S. Ely, et al., have and recover of and from the said Northern Pacific Railway Company and from F. H. Mason and Henry M. Richards, sureties, the costs of this action taxed and allowed at one hundred and thirty-one and 25-100 dollars, and that execution issue therefor. And it is further ordered that this cause be remitted to the said superior court for further proceedings in accordance with the opinion herein filed.

EXHIBIT B.

STATE OF WASHINGTON, In Supreme Court.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM S. ELY, MARVIN ARNOLD, JULIA Arnold, Covert August, Pauline E. August, Michael Blessing, Mary Blessing, John J. Browne, Annna W. Browne, Z. Colby, Sophia Colby, Equitable Trust Company (otherwise known as Jennings Trust Company), Joseph B. Goodner, Sallie Goodner, Eugene G. Germond, Claudia A. Germond, Anton Hahn, I. S. Kaufman, Claribel Kaufman, Jacob Loertcher, James McKenzie, Jennie McKenzie, Northwestern and Pacific Hypotheek Bank, Gustave Reith, Olof Hammerlund, Carl J. Berggren, W. F. Mitchem, Ida Mitchem, James Albi, William Albi, Henry Willey, Sarah Willey, the heirs of James Laughlin, deceased, and John Kildea, administrator of estate of James Laughlin, deceased,

Defendants in Error.

Now comes the Northern Pacific Railway Company, a corporation, plaintiff in error, and prays that a writ of error in the above entitled case may issue

to said the supreme court for the state of Washington, to review a certain judgment entered in said court on the 29th day of June, 1901, in favor of the said William S. Ely, Marvin Arnold, Julia Arnold, Covert August, Pauline E. August, Michael Blessing, Mary Blessing, John J. Browne, Anna W. Browne, Z. Colby, Sophia Colby, Equitable Trust Company (otherwise known as Jennings Trust Company), Joseph B. Goodner, Sallie Goodner, Eugene G. Germond, Claudia A. Germond, Anton Hahn, I. S. Kaufman, Claribel Kaufman, Jacob Loertcher, James McKenzie, Jennie McKenzie, Northwestern and Pacific Hypotheek Bank, Gustave Reith, Olof Hammerlund, Carl J. Berggren, W. F. Mitchem, Ida Mitchem, James Albi and William Albi, Henry Willey and Sarah Willey, the heirs of James Laughlin, deceased, John Kildea, as administrator of James Laughlin, deceased, defendants in error, and against the said Northern Pacific Railway Company, plaintiff in error, affirming a judgment entered in the superior court of the state of Washington, in and for the county of Spokane, in favor of said defendants in error, for the reason that manifest error hath intervened in the rendition of said judgment of said Supreme Court of the state of Washington to the great damage of the said plaintiff in error, and the said Northern Pacific Railway Company, plaintiff in error, assigns the following errors in the rendition of said judgment by the Supreme Court of Washington:

1. The court erred in affirming the judgment of

the superior court of the state of Washington, in and for the county of Spokane.

2. The court erred in holding and deciding that any portion of the right of way granted by that certain act of congress approved July 2, 1864, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific coast by the northern route," to the Northern Pacific Railroad Company, could be acquired by adverse possession and occupation of the defendants under the statutes of Washington.

3. The court erred in denying the title of the Northern Pacific Railway Company to the premises in controversy founded upon the grant by the United States to the Northern Pacific Railroad Company, the predecessor in interest of said Northern Pacific Railway Company.

4. The court erred in holding and deciding that any portion of the right of way in controversy could be alienated by the Northern Pacific Railway Company or its predecessor in interest, the Northern Pacific Railroad Company.

5. The court erred in holding and deciding that any portion of the right of way in controversy was lost by the Northern Pacific Railway Company, or its predecessor in interest, the Northern Pacific Railroad Company, by abandonment or by acquiescence in the occupation and improvement thereof by said defendants.

6. The court erred in holding and deciding that any portion of the right of way in controversy was lost by the Northern Pacific Railway Company, or its predecessor in interest, the Northern Pacific Railroad Company, by estoppel.

7. The court erred in its judgment wherein and whereby it held that the defendants in error had the right to use and occupy the premises in controversy notwithstanding the grant thereof under the said act of congress of July 2, 1864, to the said Northern Pacific Railroad Company, the predecessor in interest of the plaintiff in error.

NORTHERN PACIFIC RAILWAY COMPANY,
By C. W. BUNN,
H. M. STEPHENS,
JOHN M. BUNN,
Its Attorneys.

Writ allowed.

MARK A. FULLERTON,
Chief Justice and Presiding Justice of
the Supreme Court of Washington.

ENDORSEMENT.

3681. Filed May 29, 1903. C. S. Reinhart, clerk.

EXHIBIT C.

UNITED STATES OF AMERICA.

The President of the United States, to the Honorable Supreme Court of the state of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said supreme court of the state of Washington before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had, in a suit between Northern Pacific Railway Company, plaintiff, and William S. Ely, Marvin Arnold, Julia Arnold, Covert August, Pauline E. August, Michael Blessing, Mary Blessing, John J. Browne, Anna W. Browne, Z. Colby, Sophia Colby, Equitable Trust Company (otherwise known as the Jennings Trust Company), Joseph B. Goodner, Sallie Goodner, Eugene G. Germond, Claudia A. Germond, Anton Hahn, I. S. Kaufman, Claribel Kaufman, Jacob Loertcher, James McKenzie, Jennie McKenzie, Northwestern and Pacific Hypotheek Bank, Gustave Reith, Olof Hammerlund, Carl J. Berggren, W. F. Mitchem, Ida Mitchem, James Albi, William Albi, Henry Willey, Sarah Willey, the heirs of James Laughlin, deceased, and John Kildea, as administrator of the estate of James Laughlin, deceased, defendants, wherein was drawn in question the validity of a statute or an authority exercised under the United States, and the decision was against its va-

lidity, a manifest error hath intervened, to the great damage of the said Northern Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the supreme court of the United States, together with this writ, so that you may have the same at the city of Washington, in the District of Columbia, within sixty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, chief Justice of the said supreme court, this 28th day of May, in the year of our Lord one thousand nine hundred and three.

(Seal)

A. REEVES AYERS,
Clerk of the Circuit Court of the United States for the District of Washington.

The above writ is hereby allowed.

MARK A. FULLERTON,
Chief Justice Supreme Court, of Washington.

SUPREME COURT OF THE UNITED STATES.
October Term, 1903.

No. 366.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM S. ELY, et al.,

To Mr. Samuel R. Stern,
Attorney for William S. Ely.

Mr. F. T. Post,
Attorney for John J. Browne, Anna W. Browne, Isaac S. Kaufman, Claribel Kaufman, Equitable Trust Company (otherwise known as Jennings Trust Company), Northwestern and Pacific Hypotheek Bank, Jennie McKenzie, James McKenzie, Joseph B. Goodner, Sallie Goodner, Covert August, Pauline E. August, Henry Willey and Sarah Willey.

Messrs. Henley, Kellam & Lindsley,
Attorneys for Jacob Loertcher, Eugene G. Germond, Claudia A. Germond, Olof Hammerlund, Carl J. Berggren, W. F. Mitchem, Ida Mitchem, James Albi and William Albi.

Messrs Scott & Rosslow and
Mr. John B. Hess,
Attorneys for Anton Hahn, Z. Colby and Sophia Colby.

Mr. James Dawson,
Attorney for Gustave Reith, Marvin Arnold, Julia Arnold, Michael Blessing, Mary Blessing and John Kildea, as administrator of the estate of James Laughlin, deceased.

You will please take notice that the undersigned will move the court on the first day of October Term, 1903, of said court, namely, on October 12th, 1903, at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order amending the petition for writ of error herein, and if such motion shall be denied, for an order dismissing the writ of error herein. A printed copy of such motion and the statement on which it is based is herewith served upon you.

Dated September 3rd, 1903.

C. W. BUNN and
JAMES B. KERR,
Counsel for Northern Pacific Railway Company, Plaintiff in Error.

Supreme Court of the United States

Supreme Court of the United States

OCTOBER TERM, 1904.

No. 102.

THE NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
WILLIAM S. ELY, MARVIN ARNOLD, JULIA ARNOLD, ET AL.,
Defendants.

BRIEF OF DEFENDANTS.

John J. Browne and Anna W. Browne; Jennie McKenzie and James McKenzie; Northwestern and Pacific Hypotheekbank; Isaac Kaufman, Claribel Kaufman and Equitable Trust Company; Joseph B. Goodner and Sallie Goodner; Covert August and Pauline August.

F. T. POST,
HAROLD PRESTON,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1904.

No. 102.

THE NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
WILLIAM S. ELY, MARVIN ARNOLD, JULIA ARNOLD, ET AL.,
Defendants.

BRIEF OF DEFENDANTS.

John J. Browne and Anna W. Browne; Jennie McKenzie and James McKenzie; Northwestern and Pacific Hypotheekbank; Isaac Kaufman, Claribel Kaufman and Equitable Trust Company; Joseph B. Goodner and Sallie Goodner; Covert August and Pauline August.

This action is not in ejectment. It is in equity praying decree quieting title and for permanent injunction. It is against many parties having nothing in common. The property described in bill is an alleged right-of-way, several miles

in length. The prayer of the bill shows nature of action (p. 8 of Transcript.)

HAS THIS COURT ACQUIRED JURISDICTION?

The Railroad Company invoked the jurisdiction of the state court and brought its bill therein. Being defeated in both the lower and appellate courts it has sued out a writ of error to this court. Its theory is that an interpretation of the act of congress incorporating its predecessor is necessarily involved. As a matter of fact the State Supreme Court did not base its decision upon any interpretation of this federal statute, but upon an entirely independent ground.

In its opinion that court said (p. 130 of Record):

> "It will be observed that this case does not involve in any manner a construction of the act of congress incorporating the Northern Pacific Railroad Company, or the granting to the company of its right-of-way. Neither is this action against the company as many of the actions are which are cited by the appellant. There is no attempt here to bind the company by an *ultra vires* agreement, but the attempt is on the part of the company to repudiate executed contracts and rights which have grown up through the laches, negligence and direct agreements of the company. Neither is this an action where the court has attempted to determine how much of the right-of-way was necessary for the railway company to use in operating its road."

Also (p. 131):

> "If the doctrine of estoppel can ever be invoked it seems to us that it should be invoked in this case against the appellant. In any event, the question of protecting the rights of the government is not one which can be raised by the appellant. If the rights of the government are in any way involved or jeopardized by the possession of these lands by the defendants, the government may act in the premises unaided by the appellant whose negligence and laches have been the cause of these investments by the defendants. The appellant should not be allowed to escape the consequences of its own wrongful acts and reap a fraudulent benefit by pleading the rights of the government."

The concluding words of the opinion are (p. 135 of Record):

> "In consideration of all the circumstances surrounding this case and of the underlying principles governing rights and remedies, we are of the opinion that the judgment should be affirmed."

It had been held in an early day, as in this cause, that an action of this kind is equitable in character.

> *Smith v. Wingard,* 3 Washington Territory Rep., 398.

And the Railroad Company was necessarily familiar with this doctrine when this action was brought.

The question involved herein was passed upon by this court in *De Saussure v. Gaillard,* 127 U. S., 216. The court said:

> "It is a well settled rule, limiting the jurisdiction of this court in such cases, that 'Where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the constitution, laws, or treaties of the United States, or upon some other independent ground, and it appears that the court did in fact, base its judgment on such independent ground, and not on the law raising the federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one.' *Klinger v. Missouri,* 13 Wall., 257, 263, per Mr. Justice Bradley. And it has been repeatedly decided, under section 709 of the Revised Statutes, that to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."

Later, and in *Seeberger v. McCormick,* 175 U. S., 128, this court said:

> "It has been frequently held that the contention, even if formally made, that plaintiffs in error were seeking

to avail themselves of some right or immunity under the Constitution or laws of the United States, does not give us jurisdiction to review the judgment of the Supreme Court of a state where that judgment was based upon a doctrine of general law sufficient of itself to determine the case. *Beaupre v. Noyes,* 138 U. S., 397, 39 L. ed., 991, 11 Sup. Ct. Rep., 296; *Eustis v. Bolles,* 150 U. S., 361, 37 L. ed., 1111, 14 Sup. Ct. Rep., 131; *Pierce v. Somerset R. Co.,* 171 U. S., 641, 43 L. ed., 316, 19 Sup. Ct. Rep., 64; *Remington Paper Co. v. Watson,* 173 U. S., 443, 43 L. ed., 762, 19 Sup. Ct. Rep., 456."

We submit that this court is without jurisdiction and that the writ of error should be dismissed.

ON THE MERITS.

We shall take up the cases of the different defendants separately. There are some material differences in the facts. It by no means follows that the plaintiff in error is entitled to a reversal of this case as to any of the defendants under the doctrine laid down in the case of *Northern Pacific Railroad Company v. Townsend,* 23 Sup. Ct. Rep., 671. We do, however, first respectfully contend that the rule adopted in that case is erroneous and should not be followed.

That case went up from the Supreme Court of Minnesota where it was decided July 12, 1901, 84 Minn., 152. The case at bar was decided by the Supreme Court of Washington

June 29, 1901, 25 Wash., 384. The Railroad Company sued out a writ of error in the Minnesota case at once and allowed the Washington case to stand until the decision of this court had been rendered in the former case. The object of this conduct was manifestly to establish a precedent in a cause that presented the fewest problems. In the court's opinion in the *Townsend* case is a quoted statement made in the *Smith* case, 171 U. S., 261:

> "By granting a right-of-way four hundred feet in width Congress must be understood to have conclusively determined that a strip of that width was necessary for public work of such importance."

That statement was wholly unnecessary in the decision of the *Smith* case. It was mere dictum. Now is it a fact that Congress intended to decide that when the railroad should be constructed along the bank of mountain streams, as necessarily it would be so constructed, a four hundred foot right-of-way was conclusively necessary? Or when it should pass through the Bad Lands of Dakota or across a rolling prairie, or through farm lands? Congress should not be accused of such lack of judgment. Did Congress mean to hamper the Railroad Company by compelling it to maintain, preserve, care for or pay taxes on a right-of-way that was useless? Did it mean to thus destroy large quantities of valuable tillable land and thus injure the settler, and the public, and the Government without any benefit to the corporation? Rather did not Congress mean that the Railroad Company should be given a right-of-way of unusual width so as to meet every

emergency, leaving to it the right to abandon or alien such parts thereof as it should not desire to use? Is not this the reasonable and sensible construction thereof? Such at least is the construction that has been from the beginning put thereon by the Railroad Company itself; by the public generally; by the state courts and by the Government through the Secretary of the Interior. This will be referred to more fully hereinafter.

This court also, in its opinion in the *Townsend* case, said:

> "As our construction of the act of Congress determines the question presented for decision, it becomes unnecessary to review the cases which have been called to our attention, supporting on the one hand or denying on the other, the broad contention that title by adverse possession under state statutes of limitations may be acquired by individuals to land within the right-of-way of a railroad. *None of the cases adverted to as holding the affirmative of the proposition even suggest that the rule would be applicable where its enforcement would conflict with the powers and duties imposed by law on a railroad corporation in a given case.*" (Italics are ours.)

We respectfully submit that this statement is not accurate and that the question is a material one.

Is there any difference as to the interest of the Railroad Company in or the powers it has concerning right-of-way

lands granted under section 2 of the act of Congress of July 2, 1864 (13 Statutes at Large, 365; being the act incorporating the Northern Pacific Railroad Company), and the right-of way acquired under section 7 of the same act? Section 7 authorizes condemnation proceedings to acquire right-of-way. Manifestly Congress did not intend there should be any difference or distinction. Now each state has an eminent domain statute. Railroad companies have acquired thousands of miles of rights-of-way under such statutes. Much of the right-of-way of the Northern Pacific Railroad Company, at least of the branch lines, has been acquired under state statutes of eminent domain. As to other transcontinental railroads some of their right-of-way has been acquired under special acts of Congress or the general act of March 3, 1875, 18 Statutes at Large, 482, and some under the state eminent domain statutes. There is no material difference in the language of these statutes as to the interest acquired in the land by the railroad company or its power over it.

The object and purpose of all these statutes is the same. The consideration given the nation or the state for the power of eminent domain is future service to the nation, the state, the people. Any difference as to details do not affect the principle. There should be uniformity in the law as to the questions involved. As to the Northern Pacific, the Union Pacific, the Great Northern, or any other railroad, must it be the law that it may lose through abandonment or adverse possession unused portions of its right-of-way when such right-of-way was acquired under the state statute, but it may

not when such right-of-way was acquired under some special or general act of Congress?

Is this question one of such vital importance that this court is called upon to differ with all the state courts, no matter what the results may be? Especially when the railroad companies and the public have for more than twenty years given these statutes a different construction and great hardship might follow from such doctrine. (See facts set forth at page 125 of Record as to platting and deeding part of right-of-way by Northern Pacific in City of Spokane and the building of blocks thereon.)

The Government, through the Secretary of the Interior, took a position directly the opposite of the decision of this court in the *Townsend* case in a letter to Congress concerning a ratification act passed, which we will hereafter more particularly refer to.

The statement quoted as to the decisions of the state courts is, we conceive, not correct.

In *Pittsburg C. C. & St. Ry. Co. v. Stickley,* 155 Ind., 312, the court said:

> "But there is no reason why a railroad company should not be permitted to dispose of land it does not need in fulfilling its public duties, or why, *if it disposes of land it does need, it should not be compelled, if it wishes to avoid a forfeiture of its charter, to re-acquire the land by purchase or condemnation.* * * *

The State confers the power of eminent domain to enable railway companies to perform efficiently their duties as common carriers. But it is not apparent why the State should be concerned in preventing investors in railway stocks from sustaining loss through the negligence of their agents."

That a railroad company may lose by abandonment or adverse possession unused portions of its right-of-way has been held in Illinois by several decisions.

Railroad v. Houghton, 126 Ill., 233.
Railroad v. O'Connor, 154 Ill., 550.
Railroad v. Moore, 160 Ill., 9.
Railroad v. Donohue, 165 Ill., 640.
Railroad v. Wakefield, 173 Ill., 564.

Also in other states:

Matthews v. Lake Shore R. R., 110 Mich., 170.
Turner v. Fitchburg R. R., 145 Mass., 143.
Gay v. Boston A. R. Co., 141 Mass., 407
Paxton v. Yazoo & M. V. R. R., 76 Miss., 536.
Spottswood v. Morris E. R. Co., 61 N. J. Law, 322.
Townsend v. N. P. R. R. Co., 84 Minn., 152.

Also in England and Canada:

Bobbitt v. Railway Co., 9 Q. B. Div., 424.
Newton v. Railway Co., 13 Ch. Div., 268.
Rosseau v. Railway Co., 17 Ont. App., 483.

This is the unanimous doctrine of the state courts, except California, and the question referred to was not considered

in the opinion. The executive officers of the Government have conceded the power of the Northern Pacific to dispose of parts of its right-of-way. It did make such disposition to *bona fide* purchasers more than twenty years ago. Valuable permanent improvements have been made thereon in good faith. To lay down a different rule than that adopted by the Government, by the people, by the railroads, by all the state courts, is to produce inconsistencies and absurdities, destroy uniformity and work great hardships. No good can result therefrom while manifest injuries follow.

We submit this court should reconsider the doctrine enunciated in the *Townsend* case, and adopt the rule laid down in the state courts very tersely stated by the Indiana court.

AS TO DEFENDANTS BROWNE.

We contend that notwithstanding the decision of this court in the *Townsend* case, even though the rule therein adopted should be followed, the plaintiff in error is not entitled to a reversal of the judgment below for the reasons hereinafter stated.

(A) The first sentence in the opinion in the *Townsend* case is:

> "At the outset we premise that as the grant of the right-of-way, the filing of the map of definite location and the construction of the railroad within the quarter section in question preceded the filing of the homestead entries on such section, the land forming the right-of-

way therein was taken out of the category of public lands subject to pre-emption and sale, and the department was, therefore, without authority to convey rights therein. It follows that the homesteaders acquired no interest in the land within the right-of-way because of the fact that the grant to them was of the full legal subdivisions."

The facts in the case at bar are contrary to those stated in above quotation. The map of definite location of the railroad, so far as the land in question is concerned, was not filed until October 4, 1880 (p. 112 of Record). Browne settled upon this land April 15, 1879. It was then unsurveyed. He duly made pre-emption entry under such settlement in January, 1881. He made payment of purchase price to the Government in 1882, and obtained patent without reservations or conditions (p. 123 of Record). That his title related back to the date of settlement cannot, of course, be controverted. Such is the statute and numerous decisions of this court. Browne paid for the full acreage and the Government conveyed the same without reservations. The railroad right-of-way was, before the map of definite location was filed, a mere "float." It was not intended by Congress that every man who should settle upon any land in the great northwest between 1864 and the time that the Railroad Company should see fit to file a map of definite location, made such settlement subject to having a part of his home taken away from him without compensation. The Northern Pacific act was passed in 1864. The map of definite location at this

point was not filed until seventeen years thereafter. The Government intended to keep faith with *bona fide* settlers. The Railroad Company was given the right of condemnation in such cases by section 7 of the act. This was a just provision. The principles established in the case of *Northern Pacific Railroad Company v. Nelson,* 188 U. S., 108, are applicable to the case at bar. Browne's title antidates and is paramount to any claim that might be made by the Railroad Company.

This fact was recognized and acted upon by the Railroad Company and Browne. In 1881 the Railroad Company platted part of section nineteen (19) in the City of Spokane under the name of "Railroad Addition." This was but a year after the original townsite was platted. The Railroad Company thus platted a part of its right-of-way in that section and sold the lots so platted. It designated upon its plat the right-of-way to be used as such as "Railroad Street," giving it a width of 229 feet. The Railroad Company entered into an agreement with Browne as to the character of this platting and as well as to the platting that should be done by him of the land in question under the name of Browne's Addition, and it was in accordance with such agreement that Browne divided into lots, blocks and streets all of the land pre-empted by him, leaving a strip 200 feet in width to correspond with "Railroad Street" in Railroad Addition, (which adjoined his land on the east), and Browne likewise designated upon his plat such strip as "Railroad Street." The Railroad Company has never been in possesion of any other

part of Browne's land except "Railroad Street," and the tracks were laid and are still maintained in the center thereof (pp. 124-5 of Record). At the time the railroad was built and ever since until the commencement of this action, Browne's title to all of this land was conceded by the Railroad Company, except this two hundred foot strip that he had dedicated to and for the use of the Railroad Company. It is under this dedication and agreement that the Northern Pacific gets its title to the two hundred foot right-of-way. We submit that Browne's title is paramount as to all of said land except the two hundred foot strip:

(1) Under the principles adopted in the Nelson case.

(2) Under the contemporary construction of the law and the facts adopted by the parties more than twenty years ago.

(3) Under the agreement of settlement of any question there might be over their respective rights made at the time the railroad was built.

(B) Under another well settled principle, the plaintiff cannot now recover this land. *Browne was placed in exclusive possession of all of this right-of-way except the ample two hundred foot strip called "Railroad Street" by the Railroad Company through its contracts and by its acts at the time the road was built.* If such agreements and such acts were *ultra vires* they cannot now maintain an action to recover such possession. This court said in *St. Louis V. I. H. R. Co. v. Terre Haute & T. R. Co.*, 145 U. S., 393:

"In the case at bar the contract by which the plaintiff

conveyed its railroad and franchise to the defendant for a term of 999 years was beyond the defendant's corporate powers, and therefore unlawful and void, of which the plaintiff was bound to take notice. The plaintiff stood in the position of alienating the powers which it had received from the state and the duties which it owed to the public to another corporation which it knew had no legal capacity to exercise those powers or to perform those duties. If, as the plaintiff contends, the contract was also beyond its corporate powers it is certainly in no better position. In either aspect of the case the plaintiff was *in pari delicto* with the defendant. The invalidity of the contract in view of the laws of which both parties were bound to take notice was apparent on its face. The contract has been fully executed on the part of the plaintiff by the actual transfer of its railroad and franchise to the defendant; and the defendant has held the property and paid the stipulated consideration from time to time for seventeen years, and has taken no steps to rescind or repudiate the contract. Upon this state of facts, for the reasons above stated, the plaintiff considered as a party to the unlawful contract has no right to invoke the assistance of a court of equity to set it aside. And so far as the plaintiff corporation can be considered as representing the stockholders and seeking to protect their interests, it and they are barred by *laches*. * * * The case is not like those in which the defendant having abandoned or refused to perform the

> unlawful contract, has been held liable to the plaintiff as upon an applied contract for the value of what it had received from him and had no right to retain. * * * But the case is one in which, in the words of Mr. Justice Miller in a case often cited in this opinion, the court will not disturb the possession of the property that has passed under the contract, but will refuse to interfere as the matter stands."

The case at bar is in equity, although, as stated in the above decision, the rule would not be different if it were at law.

> *Northern Pacific R. R. Co. v. Ely*, 25 Wash., 384.
> *Smith v. Wingard*, 3 Wash. Ter. Reps., 298.

(C) As stated above, the Northern Pacific Railroad Company had from the beginning taken a different position concerning its power to alienate what it deemed to be useless parts of its right-of-way than that stated in the *Townsend* case, and the position taken by the Railroad Company had been concurred in by the Government, by the public and by the state courts. As a result thereof large expenditures have been made by private individuals in permanent improvements on parts of this four hundred foot strip. At the last session of Congress a validating bill was introduced. That bill was referred to the Secretary of the Interior and he made a report to the committee of the House of Representatives, to which the bill was referred, stating that the bill was useless because the Railroad Company had the power to alienate such parts

of its right-of-way as it deemed to be useless, and that such power had always been recognized by the Government. The Secretary of the Interior at the time of writing this letter, was evidently unfamiliar with the *Townsend* case. He stated, however, the theretofore settled policy of the Government, and the rule that had been adopted and in force ever since 1864 under which valuable property rights had been supposedly obtained by private citizens and large expenditures of money made. Upon the Secretary of the Interior being advised of the *Townsend* case he withdrew his objections to the passage of the validating act and such act was passed, entitled:

> "An Act Validating Certain Conveyances of the Northern Pacific Railroad Company and the Northern Pacific Railway Company,"

and the same was approved April 28, 1904. Such act, without preamble, provides:

> "That all conveyances heretofore made by the Northern Pacific Railroad Company or by the Northern Pacific Railway Company, of land forming a part of the right-of-way of the Northern Pacific Railroad granted by the Government by any act of Congress, are hereby legalized, validated and confirmed; provided, that no such conveyance shall have effect to diminish said right-of-way to a less width than one hundred feet on each side of the center of the main track of the railroad as now established and maintained."

Also,

> "That this act shall have no validating force until the Northern Pacific Railway Company shall file with the Secretary of the Interior an instrument in writing accepting its terms and provisions."

Such instrument in writing accepting the terms and provisions of the act was promptly filed with the Secretary of the Interior by the Railway Company.

It was said by this court in *United States v. Chaves*, 159 U. S., 452:

> "Without going at length into the subject it may be safely said that by the weight of authority as well as the preponderance of opinion, it is the general rule of American law that a grant will be presumed upon proof of an adverse, exclusive and uninterrupted possession for twenty years and that such rule will be applied as a *presumptio juris et de jure* wherever by possibility a right may be acquired in any manner known to the law."

It is also said by this court in *Toltec Ranch Company v. Cook*, 191 U. S., 522, decided December 21, 1903, that

> "Adverse possession, therefore, may be said to transfer the title as effectually as a conveyance from the owner; it may be considered as tantamount to a conveyance."

This validating act was passed after this decision was rendered and presumptively with knowledge of the language

quoted. We contend that if Browne's claim rested merely on adverse possession, such possession being considered *as tantamount to a conveyance* the question raised by the Railroad Company is eliminated by the act of Congress above mentioned. Browne's claim, however, is not based merely upon adverse possession, but it is an admitted fact, and so stated in the bill of exceptions, that Browne's platting of the land in question, his possession thereof from the beginning, his payment of taxes thereon, and his construction of valuable improvements thereon, were all in pursuance of a contract entered into with the Railroad Company before and at the time of the building of the road itself under which the company conceded to him such land and gave to him exclusive possession thereof and undertook to abandon all interest therein. *Such contract and such conduct would constitute a conveyance in equity and certainly comes within the language of the recent act of Congress and the intent thereof.*

AS TO DEFENDANTS McKENZIE.

Point "A" discussed above under the sub-head as to defendants Browne applies here also. The defendants McKenzie derived their title from Henry T. Cowley, who filed upon the land in question as a homestead on May 12, 1879, and obtained a patent therefor from the Government, which patent contained no exceptions or reservation or mention of the right-of-way (p. 122 of Record). The map of definite location of the right-of-way was filed in October, 1880 (p. 112 of Record).

Point "B" is also applicable so far as the question of *laches* is concerned.

Point "C" is also applicable except that a small part of the land in question is within one hundred feet of the railroad tracks.

AS TO DEFENDANT NORTHWESTERN AND PACIFIC HYPOTHEEKBANK.

Point "A," referred to in the Browne case, is equally applicable as to this defendant. Its title was derived from Henry T. Cowley, who entered upon this land as a homestead on May 12, 1879, and thereafter obtained a patent from the Government without exception or reservation.

The question of *laches* is likewise applicable.

Point "C" is equally applicable. *All* the land in question as to this defendant is distant more than one hundred feet from the railroad tracks (p. 118 of Record).

AS TO DEFENDANTS KAUFMAN AND EQUITABLE TRUST COMPANY.

The title of these defendants is obtained from the same source as the last two defendants named, to-wit: Mr. Cowley, and the position of these defendants is identical with that of the defendants McKenzie (p. 120 of Record).

AS TO DEFENDANTS GOODNER.

The bill of exceptions states (p. 116 of Record) that these

defendants took up the land in question as a homestead, making final proof on November 16, 1883, and obtaining a patent on August 21, 1884, under said homestead entry. It, therefore, follows that they settled upon the land prior to the filing of the map of definite location of the railroad. A part of the land in question is within one hundred feet from the railroad tracks and a part without.

The point of *laches* is also applicable in this case.

Respectfully submitted,

F. T. POST,

HAROLD PRESTON,

Of Counsel.

Supreme Court of the United States

Supreme Court of the United States

OCTOBER TERM, 1904.

No. 102.

THE NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM S. ELY, ET AL.,
Defendants.

Brief of Defendant William S. Ely.

SAMUEL R. STERN and
WILLIAM E. CULLEN,
(Spokane, Wash.),
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1904.

No. 102.

THE NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM S. ELY, ET AL.,
Defendants.

Brief of Defendant William S. Ely.

Owing to a misconception of the time vouchsafed us for filing a brief herein in behalf of defendant, William S. Ely, we are unduly hurried in the preparation of this one in order to comply with the rules of this Court as to the time for filing

same, and must therefore apologize for its form and substance and for referring to the brief interposed herein by Messrs. Post and Preston in behalf of other defendants similarly affected.

We desire in behalf of this defendant, William S. Ely, to invoke all the points, and the authorities so well urged in behalf of the defendants Brown, et al., supplementing our suggestions with a few facts and reasons why, in the case of the defendant Ely, the judgment should be affirmed.

I.

The jurisdiction of this Court cannot be invoked by the appellants.

Smith v. Wingard, 3 Wash. Ter. Rep., 398.
De Saussure v. Gaillard, 127 U. S., 216.
Seeberger v. McCormick, 175 U. S., 128.

An inspection of the opinion of the Supreme Court of Washington in the case at bar makes it manifest that the state court was also of the opinion that no appeal would lie from its decision to the Supreme Court of the United States, and we desire to call the Court's attention to the language to be found at page 130 of the Record and in part included in the excerpt quoted in the brief of Messrs. Post and Preston, to which there might well be added the following:

"But it was a determination of the fact of how much of the right of way the railroad company had abandoned, and how much of the right of way according to

its own declaration it did not need for the purpose of operating its road, and how much it could abandon without defeating the purpose for which the grant was made."

The Court then proceeded to demonstrate that the case of *The Northern Pacific Railway Co. v. Smith,* 171 U. S., 260, was not necessarily decisive of the question involved in the case at bar.

The statements contained in earlier portions of the opinion (trans. p. 129) again indicate the three questions raised in the State Supreme Court; and the appellant seemed perfectly content to rest the decision upon the question of adverse possession under the state statutes, and but for the case of *Northern Pacific Railroad Co. v. Townsend,* 23 *supra,* Ct. Rep., 671, would probably have pursued the case at bar no further.

II.

ON THE MERITS.

The title of the defendant Ely should be adjudged superior to that of the appellant.

It is our purpose to show that there are points of difference between the case at bar and the Townsend and Smith cases, and that upon the merits of this particular case this defendant should prevail.

In the Smith case the Court said, that apart from the effect of the judgment of *res adjudicata,* it was quite apparent

that Smith was thereby visited with notice of the claim of the railroad company; and again it was stated—

> "That the property holder, if cognizant of the facts, may, by permitting a railroad company without objection, to take possession of land, construct its track, and operate its road, preclude himself from a remedy by an action in ejectment. His remedy must be sought either in a suit in equity, or in a proceeding under the statute, if one be provided, regulating the appropriating of private property for railroad purposes."

In the pending case just the reverse of these facts are disclosed. The appellant rather than the respondent is precluded by the known facts to say nothing of its course of conduct. There was no prior adjudication from which notice could have been attributed to defendant Ely.

In the Smith case Mr. Justice White at the outset of the opinion states that the grant of the right of way, filing of map of definite location and the construction of the railroad preceded the filing of the homestead entries. Just the reverse is to be found in the present case as to all the defendants who derived title through persons whose patents and plats were filed prior to the taking of any steps on the part of the railroad company.

What are the facts found as to the defendant Ely? Prior to 1886 S. G. Havermale and wife were the owners and had the fee simple title to a large tract of land including lot one

(1), block three (3), now belonging to the defendant Ely, this particular lot facing on three streets according to a recorded plat of Havermale's Addition. The plat of this addition had been of record to the knowledge of appellant here since Oct. 1, 1879, and no objections of any kind had ever been made by the appellant or its predecessors, not alone to the filing of said plat, but to the use and occupancy of said lot and the streets upon which the same faced, Riverside avenue being the principal business street of Spokane, Sprague avenue, the next street in point of importance, and Division street, also one of the main arteries of that city. Sidewalks were laid, sewers built, streets paved and continuously used during all of these years by the public because of the dedication of the same as streets. That no portion of this lot was used for railroad purposes. That the property was deeded from time to time, the various grantees paying for the property in good faith and the title being passed by the leading lawyers of the city of Spokane, and ultimately vesting in Alice Houghton, who, in turn, gave to the defendant, Ely, a mortgage which said Ely was compelled to foreclose. That he bid in the property under the judgment obtained in said foreclosure proceedings, said judgment amounting to $8687.50, exclusive of costs and attorney's fees. (See Trans., pp. 92-4.)

It further appeared that the defendant Ely had expended large sums of money in payment of taxes and assessments and in the improvement of the property, all without notice of any adverse claims on the part of the appellant, and that

he and his predecessors had continued in open and notorious possession and occupancy for upwards of ten years.

The issues as made up by the plaintiff (appellant) and the defendant Ely were tried before the Court without a jury, and the Court refused to make the findings of fact and conclusions of law requested by the appellant, but found for the defendant as to the foregoing facts. (See Trans., pp. 89-91.)

By the bill of exceptions it is further shown that proof was made of all the matters hereinbefore referred to and particularly that valuable improvements had been made upon said property by the defendant Ely, buildings being erected, and fences and sidewalks built about the same, that the street known as Division street and the avenues known as Riverside and Sprague avenues for upwards of ten years have been open to the public as the main thoroughfares of the city without objection on the part of the appellant; that for upwards of fifteen years prior to the purchase of said property by defendant Ely, S. G. Havermale received a patent from the United States and platted the land owned by him into Havermale's Addition.

It further appears (page 115 of the Transcript) that testimony was offered to show that in consideration of certain services performed by Alice Houghton, the owner of the property at the time the mortgage was made to defendant Ely, that the appellant had agreed to give a quitclaim deed of any part of the so-called right of way included within the limits of said property owned by her, and thus expressly dis-

claim ownership thereof; that the services were performed, but that the railroad company neither paid for the same nor gave said quit claim deed.

The evidence further disclosed the following chronological facts:

Plat Havermale Addition, filed October 1, 1879.

Patent from Government, June 9, 1883.

Havermale deeded Lot 1, Block 3, to Landis, December 31, 1885.

Landis deeded to Kearney, October 25, 1886.

Kearney deeded to Dwyer, November 10, 1888.

Dwyer deeded to Williams and Houghton, June 7, 1889.

Williams deeded to Houghton, June 13, 1891.

Houghton mortgaged to Ely, April 9, 1892.

Ely takes title under foreclosure, June 5, 1894.

It is thus made to appear that, unlike the Smith and Townsend cases, Havermale did not have notice of the railroad purposes to which this right of way was to be devoted, but, on the contrary, that the railroad company, when said plat was filed and patent issued, had not made use of this property in any manner whatsoever.

In the Townsend case, particularly, it appeared that the settlers saw the railroad in operation, knew that the right of way was being used for railroad purposes and were put upon inquiry, at least as to the extent of the grant to the railroad company and that it might possibly use the land in question

for railroad purposes. But in the case at bar, there was ample evidence to show that an abandonment of that portion of the right of way was contemplated, and, in fact, went into effect.

It would scarcely seem possible to more absolutely abandon a right of way and to give notice that no part of it would be used, than to permit, as this appellant did permit, the erection of expensive buildings, the making of permanent improvements, the use of a portion of the right of way for the principal streets of the city and the enclosing of the same with fences and the use of the same for sidewalks and sewers, without a word of protest, without a suggestion of ownership, without anything in fact to indicate that it required any portion of this property for its use as a right of way or in the operation of its railroad, and surely it ought to be the best judge as to what portion of the property it might wish to use and what portion it might wish to abandon, especially when it conveys the property.

Looking for a moment at the purposes of this grant, should it not be said that the same were amply fulfilled by the use made of such portions of the grant as the appellant actually used or gave notice that it would use, or might require in the operation of its road?

Undoubtedly Congress had in mind the opening up to settlers of a vast section of the country and the reasonable use and occupation of a strip of land sufficient for the purpose of operating and properly maintaining the artery which it was proposed to create.

It is not claimed by the appellant that the portion of the right of way used by it has not been and will not be sufficient for such purpose, while on the contrary its very abandonment of a portion of the same, being portions subsequently conveyed to various purchasers, would indicate that it had conceded its right to alienate the property thus conveyed, and that it made no claim as against Mrs. Houghton, who in turn was permitted to deal with this property free from any claims of any kind on the part of the railroad company.

If, under the circumstances above disclosed, this Court should fail to hold that the appellant can be estopped by its conduct under circumstances that certainly would deprive an individual of his rights, and under statutes well known to it, the hardship which will ensue is simply immeasurable. It is not a question of restoring unoccupied lands or farm lands or property of little value, but in this particular litigation, titles that have been settled for years, improvements running into millions of dollars, and the use of streets, sidewalks in a thickly populated city, are so much involved that the attention of this Court is particularly challenged and the rights of these defendants especially a subject of consideration.

We desire particularly in conclusion to quote the language of the Washington Court:

> "One holding land adversely to the rights of another can be divested only by the action of the other, even with a better right, within the time prescribed by the

statute of limitations, and this is true even though he may have originally entered under a void grant or sale. But his claim ripens into a perfect title and becomes absolute if such possession is not disturbed within the time prescribed. As is said by *Washburn on Real Property*, Fourth Edition, Vol. 3, page 164, the operation of the statute takes away the title of the real owner and transfers it, not in form, indeed, but in legal effect, to the adverse occupant. In other words, the statute of limitations gives a perfect title. The doctrine is stated thus strongly, because it seems to be the result of modern decisions, although it was once held, that the effect of the statute was merely to take away the remedy, and did not bind the estate or transfer the title."

In a case, therefore, where the full purpose of a grant has been subserved, where a line of railroad has been built, where no claim is made by such railroad that it requires land adversely held for upwards of ten years for the purpose of conducting and operating its railroad, where it has paid no taxes upon the portion of the right of way alienated, where it has allowed a city to take possession of its right of way for streets and other municipal improvements, where it has permitted expensive permanent improvements to be made, and rents to be collected, and contractual obligations of many kinds to obtain, and all in a populous part of a growing city, and all without let, hindrance, protest or objection of any kind, the courts ought not to nullify all these acts, nor uphold

a litigant in an action to quiet title under such circumstances.

The judgment should be affirmed as to the defendant Ely.

Respectfully submitted,

SAMUEL R. STERN and
WILLIAM E. CULLEN,
Of Counsel for Defendant William S. Ely.

Supreme Court of the United States.

Nos. 102 and 88.—October Term, 1904.

The Northern Pacific Railway Company, Plaintiff in Error, vs. William S. Ely, Marvin Arnold, Julia Arnold, et al.	102	In error to the Supreme Court of the State of Washington.
The Northern Pacific Railway Company, Plaintiff in Error, vs. William S. Ely et al.	88	

[February 20, 1905.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

This was a suit brought by the Northern Pacific Railway Company, successor to the Northern Pacific Railroad Company, in the Superior Court of the County of Spokane, State of Washington, against a large number of persons, to quiet title, remove clouds and recover possession of certain parcels of real estate, alleged to be portions of its right of way in that county.

The complaint alleged that plaintiff was the owner and entitled to a strip of land, four hundred feet wide, on which defendants had wrongfully entered. Some of the defendants were defaulted. Separate answers were interposed by others, separate trials had, separate verdicts rendered, and bill of exceptions granted. As to one defendant, the case was submitted to the court for trial, and findings of fact and conclusions of law were made and filed.

A single decree was rendered in favor of contesting defendants, from which the railway company appealed to the Supreme Court of the State, where the decree was affirmed. 25 Wash. 384.

The opinion of that court was filed June 29, 1901, and judgment of affirmance entered July 30, 1901. On May 4, 1903, the case of *Northern Pacific Railway Company* v. *Townsend*, 190 U. S. 267, was decided. May 28, 1903, the railway company was allowed a writ of error from this court, the judgment of the State Supreme Court being described as entered June 29, 1901. The case was docketed July 23, 1903, and is now numbered 88. June 30 a second writ of error was taken out and filed below, the papers correctly describing the judgment as entered July 30, 1901, and was docketed here August 13, 1903, and is now numbered 102.

Plaintiff moved for leave to amend the record in No. 88 so that the date of the judgment might be correctly given, and that thereupon No. 102 be dismissed, or, in the alternative, that No. 88 be dismissed. We grant the latter application and dismiss No. 88 without prejudice to proceeding in No. 102. *Wheeler* v. *Harris*, 13 Wall. 51; *Silsby* v. *Foote*, 20 How. 290.

The facts on which the State Supreme Court proceeded are thus stated:

"It may be conceded, we think, that the right of way which embraces the land in dispute was granted to the Northern Pacific Railroad Company by act of Congress in 1864, and that, to the title to the right of way thus granted to the Northern Pacific Railroad Company, the Northern Pacific Railway Company has succeeded. It may also be conceded, for the purposes of this case, that the Northern Pacific Railway Company has complied with all the terms and provisions of the act of Congress aforesaid, and has constructed its railroad through the whole of the line of road between the points named in the granting act; that a map of definite location was filed October 4, 1880, prior to the acquiring of the title to the land in question by the defendants or their predecessors or grantors; and that said railroad has been continuously operated since its construction. The defendants, answering, claim title by patent from the United States Government. The land was acquired under the pre-emption and homestead acts, respectively, and all the defendants or their grantors have been in quiet, peaceful, undisturbed, and undisputed possession of said land for more than ten years immediately prior to the commencement of this action, many of them for nearly twenty years. Valuable improvements have been made by the defendants, the said land consisting of town lots in the city of Spokane, and having been platted and laid out as additions to the city of Spokane by the defendants or their grantors after acquiring title to the same from the United States Government. During all these years no claim whatever to these lands has been made by the appellant. It has stood by and seen improvements made thereon, and, in the case of defendant Brown, an agreement was entered into between him and General Sprague, who was then the general superintendent of the Northern Pacific Railroad Company, that they would plat their lots so that the streets of the addition which the railroad company was dedicating would correspond with and meet the streets which Brown was dedicating to the city of Spokane, and the agreement was carried out by arranging the streets in accordance therewith. These streets have been used by the public for from ten to eighteen years. The testimony shows that, in addition to the improvements which these defendants have made upon their lots, many thousands of dollars have been paid by them for assessments levied upon abutting land for the improvement of streets running through this right of way; that the appellant has never paid these assessments; that they have never been assessed to the appellant and that no question has ever been raised by the appellant as to the right and obligation of the defendants to pay the same. While the record does not show that any of the lands owned by the defendants were deeded to them by the appellant, it does show that the Northern Pacific Railroad Company has deeded to other parties lots in the city of Spokane situated within the 400 feet of right of way, upon which valuable improvements have been made by its grantees."

It may be added that it was only as to some of the parcels that the filing of the map of definite location and the construction of the railroad preceded the filing of the entries. But we regard the case as falling within the rule holding the grant of the right of way effective from the date of the act. *Railroad Company* v. *Baldwin*, 103 U. S. 426.

The Supreme Court held that the action was barred by the statute of limitations; that the company was estopped from asserting title by reason of the circumstances; and that: "Where, through the negligence and laches of a railroad company, the occupancy by others of portions of the right of way granted to it by the Government has ripened into title by adverse possession, the company cannot set up the defence that the right of way was granted for public purposes only and that it would be against public policy to permit either its abandonment by the company or the acquisition of adverse rights therein by way of estoppel or of the bar of the statute of limitations."

As before stated, on the fourth day of May, 1903, the decision of this court in *Northern Pacific Railway Company* v. *Townsend*, 190 U. S. 267, was announced. We there ruled that individuals could not for private purposes acquire by adverse possession, under a State statute of limitations, any portion of a right of way granted by the United States to a railroad company in the manner and under the conditions that the right of way was granted to the Northern Pacific Railroad Company. At the same time it was not denied that such right of way granted through the public domain within a State was amenable to the police power of the State. And we said: "Congress must have assumed when making this grant, for instance, that in the natural order of events, as settlements were made along the line of the railroad, crossings of the right of way would become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed. But such limitations are in no sense analogous to claim of adverse ownership for private use."

We are not prepared to overrule that decision, and tested by it, the judgment in this case must be reversed. But we were then dealing with the original right of way, which was of a width of four hundred feet. April 28, 1904, an act of Congress entitled "An act validating certain conveyances of the Northern Pacific Railroad Company and the Northern Pacific Railway Company," was approved, (33 Stat. 538, c. 1782,) reading as follows:

"That all conveyances heretofore made by the Northern Pacific Railroad Company or by the Northern Pacific Railway Company, of land forming a part of the right of way of the Northern Pacific Railroad, granted by the Government by any act of Congress, are hereby legalized, validated, and confirmed: *Provided*, That no such conveyance shall have effect to diminish said right of way to a less width than one hundred feet

on each side of the center of the main track of the railroad as now established and maintained.

"SEC. 2. That this act shall have no validating force until the Northern Pacific Railway Company shall file with the Secretary of the Interior an instrument in writing, accepting its terms and provisions."

The terms and provisions of the act were accepted by the railway company June 22, 1904, and the acceptance, duly certified, was filed in the Interior Department July 7, 1904.

In *Townsend's* case it was said, among other things:

"Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted . . . Congress having plainly manifested its intention that the title to and possession of the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way cannot be treated without overthrowing the act of Congress as forming the basis of an adverse possession which may ripen into a title good as against the railroad company." 190 U. S. 271, 272.

The act of April 28, 1904, in view of our decision in that case, was obviously intended to and did have the effect to narrow the right of way to two hundred feet in width, so far at least as outside of that strip the original right of way had been parted with.

The rule in the State of Washington as to adverse possession is thus stated by the Supreme Court in this case:

"One holding land adversely to the rights of another can be divested only by the action of the other, even with a better right, within the time prescribed by the statute of limitations, and this is true, even though he may have originally entered under a void grant or sale. But his claim ripens into a perfect title and becomes absolute, if such possession is not disturbed within the time prescribed. As is said by 3 Washburn on Real Property, (5th ed.,) p. 176:

"'The operation of the statute takes away the title of the real owner and transfers it, not in form, indeed, but in legal effect, to the adverse occupant. In other words, the statute of limitations gives a perfect title. The doctrine is stated thus strongly, because it seems to be the result of modern decisions, although it was once held that the effect of the statute was merely to take away the remedy, and did not bind the estate, or transfer the title.'" 25 Wash. 388.

In *Sharon* v. *Tucker*, 144 U. S. 533, 543, where the statute of limitations in force in the District of Columbia was applied, Mr. Justice Field, speaking for the court, said:

"It is now well settled that by adverse possession for the period designated by the statute, not only is the remedy of the former owner gone, but his title has passed to the occupant, so that the latter can maintain ejectment for the possession against such former owner should he intrude upon the premises. In several of the States this doctrine has become a positive rule, by their statutes of limitations declaring that uninterrupted possession for the period designated to bar an action for the recovery of land shall, of itself, constitute a complete title. *Leffingwell* v. *Warren*, 2 Black, 599; *Campbell* v. *Holt*, 115 U. S. 620, 623."

This was quoted in *Toltec Ranch Company* v. *Cook*, 191 U. S. 532, 538, and it was remarked:

"Adverse possession, therefore, may be said to transfer the title as effectually as a conveyance from the owner; it may be considered as tantamount to a conveyance."

So far as title to portions of the right of way could be lawfully acquired from the railway company, defendants below, appellees in the Supreme Court, had acquired title to their parcels by adverse possession, and occupied the same position as if they had received conveyances, which the act of April 28, 1904, operated to confirm. The act is remedial and to be construed accordingly. The lots of some of the defendants were outside of the two hundred feet. The lots of others were partly within and partly without the strip. But the act was passed after the judgment of the Supreme Court was rendered and while the case was pending here, and it must be left to the State courts to deal with the matter in the light of the conclusions at which we have arrived.

In *Railway Company* v. *Twombly*, 100 U. S. 78, which was a writ of error to the Supreme Court of the Territory of Colorado, the act authorizing the action was repealed while the writ was pending in this court, and we, in the exercise of appellate jurisdiction, declined to send the case back to the court below with instructions to enter a judgment of nonsuit, and affirmed the judgment because we found no error.

In the present case, the parties will not be compelled to resort to some form of original proceeding to obtain relief under the act of April 28, 1904, as, apart from that statute, the decree must be reversed, and thereupon the record will be open for such adjudication as the then situation may demand.

In No. 88, *writ of error dismissed; in No.* 102, *decree reversed and cause remanded for further proceedings not inconsistent with this opinion.*

Mr. Justice HARLAN was of opinion that the decree of the State Supreme Court should be affirmed for the reasons given, and, therefore, dissented.